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No. 86-211

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

ANNA PICCININ,

Petitioner,

v.

A.H. ROBINS COMPANY, INCORPORATED, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT AETNA CASUALTY & SURETY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

John G. Harkins, Jr.*
Jan Z. Krasnowiecki
Edmund B. Spaeth, Jr.
James M. Beck
PEPPER, HAMILTON & SCHEETZ
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1083
(215) 893-3000
Attorneys for Respondent Aetna Casualty & Surety Company

*Counsel of record for Respondent Aetna Casualty & Surety Company upon whom service is to be made

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTIONS PRESENTED

This is a bankruptcy case in which there are now pending some 300,000 claims by persons who allege they were injured by the debtor's product, the Dalkon Shield intrauterine contraceptive device. When the bankruptcy petition was filed, approximately 5,000 of these claims were also pending in various federal and state court actions. About half of these actions named other defendants besides the debtor, including some that named respondent Aetna Casualty & Surety Company ("Aetna"), an insurer of the debtor. The questions presented are:

(1) Did the District Court, acting as a bankruptcy court, properly determine that claims pending against Aetna were "related to" the bankruptcy and should be transferred to its jurisdiction from the various courts in which they had originally been filed?

(2) Did the District Court, acting as a bankruptcy court, properly exercise its discretion in staying prosecution of all claims "related to" the bankruptcy, pending the formulation of a plan of reorganization and a procedure for the just disposition of all claims?

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RESPONDENT AETNA CASUALTY & SURETY COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Background

This case arises from a Chapter 11 bankruptcy petition filed in August 1985 by A.H. Robins Company, Incorporated ("Robins"). The petition was Robins' response to what the Court of Appeals accurately described as "an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an

intrauterine contraceptive device known as a Dalkon Shield," which was manufactured by Robins. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 996 (4th Cir. 1986), Appendix B at (A. 12-51). By the time Robins filed for protection, over $500 million had been spent in defending and settling thousands of such actions. *Id.* at 996 n.4 (A.14). Robins is not the only defendant named in many of the actions; plaintiffs have named other defendants, including Robins' liability insurer, respondent Aetna Casualty & Surety Company ("Aetna").

B. Petitioner's Claims

Petitioner Anna Piccinin ("Piccinin") is a citizen of the United Kingdom now living in Italy. A month before Robins' Chapter 11 petition, Piccinin, represented by Georgia counsel, brought suit against Robins and Aetna in the United States District Court for the Middle District of Alabama alleging that she had suffered injuries as a result of using a Dalkon Shield while she was living in England. Complaint ¶¶1, 4-5, (A.53-54).

Piccinin alleges that Aetna, in addition to providing liability insurance, entered into an "administrative services agreement" with Robins, whereby Aetna became Robins' "undisclosed agent." Complaint ¶¶28-29, 56 (A.60, 68). Pursuant to this arrangement, Piccinin alleges, Aetna undertook to "ma[k]e recommendations to defendant Robins with reference to labeling, adverse effects or reactions and precautions, in connection with the marketing of the Dalkon Shield." *Id.* ¶18 (A.57). Thus, Piccinin alleges, Aetna knew of the risks associated with the Dalkon Shield and participated with Robins in a "joint enterprise" and an "ongoing conspiracy" to conceal those risks and to impede the prosecution of actions against Robins. *Id.* ¶¶21, 31-38 (A.58, 61-63). According to Piccinin, Aetna thereby "assumed the duties and obligations of defendant Robins" and became "jointly and severally" liable, on a variety of theories, for the injuries Piccinin claims to have suffered from using Robins' product. *Id.* ¶¶36, 50, 56, *ad damnum* clause to Count VII (A.62, 66-68, 70).[1]

1. Aetna vigorously disputes Piccinin's claims against Aetna, but no issue here turns on whether these allegations are true or false.

C. The District Court's Orders

1. The Stay Order

It is not disputed that Robins' Chapter 11 petition automatically stayed all actions against Robins. *See* 11 U.S.C. §362(a). However, plaintiffs in a number of the multi-defendant suits sought to sever Robins and proceed solely against the remaining defendant(s). In response, Robins began an adversary proceeding against eight plaintiffs, including Piccinin, whose claims typified those being made against Robins' co-defendants. The adversary proceeding was filed in the United States District Court for the Eastern District of Virginia, the district where the Robins bankruptcy case is pending. Robins sought (1) declaratory relief adjudging Aetna's liability policy to be an asset of Robins' estate in which all Dalkon Shield claimants had an interest, and (2) injunctive relief staying the prosecution of actions against non-debtor co-defendants, such as Aetna. Aetna intervened in the proceeding as a party plaintiff. After a hearing, the District Court, Judge Robert R. Merhige, Jr. presiding,[2] by Order For Preliminary Injunction entered October 11, 1985 (A.2-8), granted both the requested declaratory relief — an action that has not been challenged — and the stay. The District Court accompanied its Order with findings of fact, which may be summarized as follows.

As of August 1985 there were some 5,000 Dalkon Shield actions pending against Robins.[3] Findings of Fact, para. 1 (A.3). In approximately 2,400 of these actions, non-debtors such as Aetna were named as as co-defendants. *Id.*, para. 2 (A.3). "Any judgment rendered against a Robins co-defendant in any of

2. Judge Merhige, an Article III judge, conducted the hearing exercising his bankruptcy powers in order to avoid the jurisdictional obstacles that would have confronted a bankruptcy judge in ruling on state law tort claims. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (plurality opinion).

3. The District Court has since ordered an extensive publicity campaign to identify additional possible claimants. Largely in response to this campaign, there are now some 300,000 Dalkon Shield claimants. Despite obvious knowledge of the bankruptcy proceedings, Piccinin has elected not to file a claim in bankruptcy.

[the 2,400] actions could result in a claim against Robins for either contractual indemnity or commonlaw contribution." *Id.* (A.3). Even if Robins were entitled to relitigate its liability for indemnity or contribution, the cumulative burden on Robins' estate of such relitigation "would significantly impede Robins' reorganization and render any plan of reorganization futile." *Id.* (A.3). In addition, were the 2,400 actions permitted to proceed against Robins' co-defendants, the necessary participation of key Robins personnel in the litigation, both as witnesses and in pre- and post-trial proceedings, "would impair the reorganization effort and would be contrary to the public interest." *Id.*, para. 3 (A.3). Accordingly:

> The continuation of litigation in those 2,400 civil actions which name Robins' co-defendants poses a significant threat to Robins' reorganization effort and could cause a direct and substantial drain upon the assets of Robins' Chapter 11 estate. If this relief sought [a stay] is not granted, a rush to judgment will likely ensue. Such a race to obtain judgments against Robins' co-defendants would be detrimental to the debtor and would adversely affect Robins' reorganization effort.

Id., para. 4 (A.4). Finally, the District Court found that the eight actions before it, among them Piccinin's,

> are representative examples of similar civil actions among the approximately 2,400 civil actions currently pending against Robins which name persons or entities other than Robins as co-defendants. The continuation of litigation in those approximately 2,400 civil actions against the various categories of co-defendants represented by the eight civil actions described above would pose a serious threat to the success of the debtor's reorganization and is contrary to the public interest.

Id., para. 14 (A.6).[4]

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4. The District Court made further specific findings with respect to each of the eight actions. With respect to Piccinin's claims, the court found that

2. The Transfer Order

By its second Order, dated November 9, 1985, the District Court, pursuant to 28 U.S.C. §§157(b)(5) and 1334(b) and 11 U.S.C. §105(a) (A.9-10), directed that all Dalkon Shield actions "related to" the Robins Chapter 11 proceeding were to be tried before it, *i.e.*, in the Richmond Division of the United States District Court for the Eastern District of Virginia. Accordingly, all such actions pending in other courts, such as Piccinin's, were ordered transferred to the Eastern District of Virginia. Order, paras. 1-3 (A.9-10). The District Court carefully provided that nothing in its Order affected its power "to abstain from hearing . . . or remanding any particular proceeding." *Id.*, para. 4 (A.10).[5]

D. The Opinion And Order Of The Court Of Appeals

Of the eight representative plaintiffs in the adversary proceeding, only Piccinin has appealed from both the District Court's Orders of October 11 and November 9, 1985.[6] The United States Court of Appeals for the Fourth Circuit, by Opinion and Order filed on April 10, 1986, affirmed both of the District Court's Orders in all pertinent respects. *A.H. Robins Co. v.*

"continuation of litigation in the Piccinin Action against The Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort." *Id*, para. 9 (A.5).

5. Pursuant to paragraph 4 of the November 9, 1985 Order, "any Dalkon Shield plaintiff may at any time petition for the vacation of the stay as it affects his or her suit." *A.H. Robins, supra*, 788 F.2d at 1008 (A.37). Unlike at least one other claimant, *id.* (A.37), Piccinin has not sought this readily available relief. Since District Court action remains available, Piccinin's petition for certiorari may properly be denied as unripe. *Cf. United States Parole Commission v. Geraghty*, 455 U.S. 388, 390 n.1, 408 (1980) (adjudication of merits would be "premature" where further District Court action was possible and could moot dispute).

6. The Committee of Representatives of Dalkon Shield Claimants, which had intervened in the adversary proceeding, also appealed, but only as to the transfer order. *A.H. Robins, supra*, 788 F.2d at 998 (A.17). The Committee is also seeking this Court's review in a related certiorari petition. *See Committee of Representatives of Dalkon Shield Claimants v. A.H. Robins Co.*, October Term, 1986, No. 86-216 (U.S.) (reported at 55 U.S.L.W. 3127 (U.S. Aug. 26, 1986)).

Piccinin, 788 F.2d 944 (4th Cir. 1986) (A.11-51).[7] In its opinion the Court of Appeals considered both of the arguments Piccinin makes to this Court, and found them of no merit.

Piccinin's first argument to this Court — designated in her petition as her "First reason" — is that the District Court should not have entered its Order of November 9, 1985, temporarily transferring her case from the District Court for the Middle District of Alabama. The Court of Appeals, however, recognized the administrative crisis confronting the District Court. It specifically noted the "very real considerations that support a centralization of all the Dalkon Shield claims, *at least at first*, in the district court having jurisdiction of the bankruptcy." 788 F.2d at 1011 (emphasis original) (A.42). The Court of Appeals discussed at length the desirability of the District Court's use of the period of temporary centralization gained by the transfer order to organize and evaluate the multitude of claims, including claims such as Piccinin's. *Id.* at 1011-14 (A.42-46). The Court of Appeals concluded:

> It is unlikely that all 8,000 to 10,000[8] claims which have been filed would have to be tried before an intelligent estimation of the claims could be made by the bankruptcy court. The interests of all the claimants and the public interest in a reasonable and fair reorganization combine in favor of an effort at an estimation of the Dalkon Shield claims as a basis for formulating such a plan of reorganization and as a possible step in working out a mechanism acceptable to

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7. The Court of Appeals expressed misgivings concerning the constitutional adequacy of the notice given to Dalkon Shield claimants who were not party to the adversary proceeding. 788 F.2d at 1014-16 (A.46-51). It therefore remanded with directions that additional notice be given. *Id.* at 1015-16 (A.49-51). This portion of the court's decision is irrelevant to Piccinin's petition for writ of certiorari, since Piccinin was party to the adversary proceeding, and in any event she makes no argument concerning adequacy of notice in her petition.

8. The Court of Appeals refers to the claims filed in various federal and state courts when the adversary proceeding was brought. The approximately 300,000 other claims filed since that time were not before it. *See* n.3, *supra*, at 3.

> all the claimants for a dispute-resolution of their claims without burdening the estate with the tremendous expense of endless litigation and reducing if not exhausting, the assets available for paying those claims.

Id. at 1013-14 (A.46). The Court of Appeals thus rejected Piccinin's attack on the District Court's transfer order.

Piccinin's second argument to this Court — designated in her petition as her "Second reason" — is that the District Court should not have entered its Order of October 11, 1985, staying prosecution of her action against Aetna. In dismissing this argument, the Court of Appeals explained that unless all claims were temporarily stayed, the process of assembling and evaluating data, and of designing a reorganization plan in light of that data, could not go forward. 788 F.2d at 1007-09 (A.35-37). The Court of Appeals concluded that "[i]t seems incontestable that, if the suits are permitted to continue and discovery allowed, any effort at reorganization of the debtor will be frustrated, if not permanently thwarted." *Id.* at 1008 (A.36). "In our opinion," the court stated, "the record was thus more than adequate to support the district court's grant of injunctive relief. Certainly, the district court did not commit an abuse of discretion in granting the injunction herein." *Id.* (A.36).

E. The On-Going Process Before The District Court

As the Court of Appeals emphasized, the District Court's Orders are part of a dynamic, continuing process, and are therefore conditional and temporary. The District Court is confronted with the monumental administrative problems that "mass toxic tort" claims have been visiting upon the nation's court systems and, most recently, the bankruptcy system. What the District Court is attempting to accomplish is to prevent the debtor, Robins, from being torn apart by the centrifugal forces of thousands (indeed now hundreds of thousands) of claims before the court can determine whether a successful plan of reorganization is possible. To have permitted Piccinin, and by necessary implication thousands of other claimants in identical positions, to litigate her

claims separately as she pleases would have disrupted and destroyed the very purpose of the bankruptcy process, as both the District Court and the Court of Appeals recognized. By temporarily centralizing and staying all claims, the District Court has enabled itself to initiate an orderly process that should result in an evaluation of all claims and a workable plan of reorganization.

To administer the reorganization and the evaluation and disposition of claims, the District Court has appointed a Special Master and several committees, each of which is advised by technical experts. These experts have begun to develop information concerning the 300,000 claims and a common basis for evaluating these claims. The Special Master has directed that the common data base must be established by the end of the year. Settlement discussions are to commence immediately thereafter. To ensure that the formulation of a plan of reorganization proceeds in tandem with the establishment of a common data base and the evaluation of the claims, the court has ordered Robins to file a revised plan of reorganization by September 30, 1986. Meanwhile, the District Court has approved procedures for the transfer of all case files to Richmond, Virginia, for storage and analysis.

No time is being lost in terms of pursuit of claims against Aetna by those claimants so-minded. On July 23, 1986, pursuant to Initial Pre-Trial Order filed July 7, 1986 (A.52), the court met with all counsel and discussed the scheduling of such matters as discovery, pre-trial motions, and trial dates for a possible consolidated trial of the claims against Aetna.

Thus, in the period of temporary centralization gained by the transfer and stay orders, the District Court is moving simultaneously on several fronts: to identify all claims; to evaluate those claims; to determine Robins' financial position; and to frame the issues for possible trial. With the information thus acquired in hand — but, as the Court of Appeals recognized, not until then — the District Court and all parties will be in position to formulate a reasonable and fair plan of reorganization of Robins and to proceed with the just compensation of all claimants.

Piccinin has sought, and by her petition to this Court continues to seek, to disrupt this orderly process and to substitute for it a race to judgment.

REASONS FOR REFUSING THE PETITION

This case presents no important or novel legal question. Rather, the issues are fact specific and involve the District Court's discretionary use of its equitable bankruptcy powers to administer a massive proceeding involving hundreds of thousands of claimants. As the Court of Appeals cautioned, "we must be mindful of the realities of modern litigation." 788 F.2d at 1013 (citation and quotation marks omitted) (A.44). Had the District Court not imposed a manageable framework on this potentially overwhelming litigation, "the expense of discovery proceedings and trial would likely consume all of the assets of the debtor," *id.* (A.44), leaving most of the claimants with nothing. The Court of Appeals, after full review of the record, has found that "very real considerations" of case management more than adequately support the District Court's exercise of discretion. *Id.* at 1011 (A.42). No reason appears for this Court to reexamine that finding. This Court "do[es] not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.). Contrary to Piccinin's claims, the decision of the Court of Appeals is not in conflict with any other appellate decision, either of this Court or of other courts of appeals. Petitioner's asserted "conflicts" are simply instances of the application of the same legal principles to different factual situations involving the exercise of essentially discretionary powers.

A. The District Court Has Properly Determined That Piccinin's Claims Against Aetna Are "Related To" The Bankruptcy And Should Be Transferred To Its Jurisdiction.

What Piccinin has asserted throughout this action, and what she contends here, is that the District Court, exercising its bankruptcy jurisdiction, should simply have severed her claims against Aetna from her claims against the debtor Robins and should have allowed her to pursue her claims against Aetna

unabated in the Middle District of Alabama. While the District Court clearly had the power to abstain as Piccinin desires, it is equally clear that it had the power to order her claims transferred to itself as the district court in which the bankruptcy is pending and that its exercise of this power was not an abuse of discretion.

1. The District Court Has Jurisdiction Over Piccinin's Claims Against Aetna As Claims "Related To" The Bankruptcy.

The pertinent jurisdictional statute provides that "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 [the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*], or arising in or *related to* cases under title 11." 28 U.S.C. §1334(b) (emphasis added). The issue before the District Court and the Court of Appeals, therefore, was whether Piccinin's claims against Aetna are "related to" the Robins bankruptcy.

This Court has acknowledged "[t]he broad range of questions that can be brought into a bankruptcy court because they are 'related to cases under title 11.'" *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982).[9] In affirming the District Court's determination that Piccinin's claims against Aetna are "related to" the bankruptcy, the Court of Appeals applied "[t]he accepted definition of the 'related to' [language] in these statutes," *A.H. Robins, supra*, 788 F.2d at 1002 n.11 (A.25), enunciated in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984):

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is

9. *Northern Pipeline* construed 28 U.S.C. §1471(b) (repealed), but the same statute that repealed §1471(b) enacted 28 U.S.C. §1334(b) using exactly the same words. Given that Congress enacted the 1984 amendments to the Bankruptcy Reform Act specifically to correct the constitutional problems identified in *Northern Pipeline*, it is to be assumed that Congress intended §1334(b) to have the same broad scope the Court gave the former §1471(b). *Haig v. Agee*, 453 U.S. 280, 297-98 (1981); *Lorillard v. Pons*, 434 U.S. 575, 480-81 (1978). The constitutional limitations concerning "related to" actions identified in *Northern Pipeline*, 458 U.S. at 86-88 & n. 40, 90, 93, are not present here since all the rulings in this case were made by an Article III District Judge.

> whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. [citations omitted] Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

Id. at 994 (emphasis original).[10]

The determination that Piccinin's claims against Aetna are "related to" the Robins bankruptcy is fully justified, for the outcome of Piccinin's action in Alabama against Aetna unquestionably would have an effect on Robins' estate. Piccinin's claims against Aetna are inextricably interwoven with her claims against Robins. Piccinin alleges that Aetna engaged in a "joint enterprise" with Robins and acted as Robins' "agent" to conceal information and obstruct the litigation of Dalkon Shield claims. Complaint ¶¶21, 31-38, 56 (A.58, 61-63, 68). She further alleges that this enterprise grew out of a series of contractual negotiations between Aetna and Robins, *id.* ¶¶24-30 (A.58-61), and involved Aetna's assuming control of both marketing and litigation decisions for Robins. *Id.* ¶31-35, 56 (A.61-62, 68). Any attempt to prove these allegations against Aetna will obviously involve evidence regarding the conduct of Robins as well as of Aetna, and

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10. The *Pacor* test has been generally adopted by the bankruptcy courts. *In re Cemetery Development Corp.*, 59 Bankr. 115, 121 (Bankr. M.D. La. 1986); *In re CLDC Management Corp.*, 58 Bankr. 176, 179-80 (Bankr. N.D. Ill. 1985); *In re John Peterson Motors, Inc.*, 56 Bankr. 588, 590 (Bankr. D. Minn. 1986); *In re DeLorean Motor Co.*, 49 Bankr. 900, 906 n.5 (Bankr. E.D. Mich. 1985); *In re Boughton*, 49 Bankr. 312, 315 (Bankr. N.D. Ill. 1985); *In re Thermo Engineering Corp.*, 47 Bankr. 656, 659 (Bankr. D.R.I. 1985); *In re Pan-American School of Travel, Inc.*, 47 Bankr. 242, 245 (Bankr. S.D.N.Y. 1985); *In re Red Lion Capital Group*, 46 Bankr. 850, 860 (Bankr. S.D.N.Y. 1985). *Cf. In re Salem Mortgage Co.*, 783 F.2d 626, 634-35 (6th Cir. 1986) *Pacor* "related to" test is too restrictive); *Zweygardt v. Colorado National Bank*, 52 Bankr. 229, 234 (Bankr. D. Colo. 1985) (*Pacor* "related to" test is too expansive).

will require extensive discovery, both testimonial and documentary, from Robins. *See In re CLDC Management Corp.*, 58 Bankr. 176, 180 (Bankr. N.D. Ill. 1985) (bankruptcy court has "related to" jurisdiction "over the various claims asserted against other defendants named as co-conspirators with [the debtor]"); *Raff v. Gordon*, 58 Bankr. 988, 992 (Bankr. E.D. Pa. 1986) (refusing, as "inefficient and unfair," to sever case where "plaintiffs make numerous claims arising out of the transactions pursuant to the contracts against both of the defendants" and where the allegations involved actions of debtor "on behalf of the defendant corporation"). Moreover, there is the uncontested fact that Aetna is responsible for one of "the most important asset[s] of [the debtor's] estate"[11] — Robins' product liability insurance.[12]

Thus, were Piccinin to prevail on her claims against Aetna, the result would not simply be damage to Robins' estate from the expense of litigation. Aetna would also have claims against Robins under general common law rules regarding contribution among joint tortfeasors[13] — claims constituting an entirely new class of estate obligations and possibly giving rise to setoffs against the insurance proceeds. *See In re Thermo Engineering Corp.*, 47 Bankr. 656, 659 (Bankr. D.R.I. 1985) (claim subject to a setoff against estate "is at least 'related to,' if not actually 'arising under,' a case under Title 11"). Given these facts, the District Court justifiably found that "[t]he continuation of litigation in the Piccinin action against the Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort." Order of Oct. 11, 1985, Findings of Fact, para. 9 (A.5). It follows

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11. *A.H. Robins, supra*, 788 F.2d at 1001 (quoting *In re Johns-Manville Corp.*, 40 Bankr. 219, 229 (S.D.N.Y. 1984) (A.23).

12. The scope of 11 U.S.C. §541(a)(1), defining the property of the debtor's estate, "is broad. It includes all kinds of property, including . . . intangible property [and] causes of action." *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983) (quoting 1978 U.S. Code Cong. & Ad. News at 5866, 6323). Other courts have also held rights to liability insurance coverage to be within the debtor's estate. *E.g., Tringali v. Hathaway Machinery Co.*, [1986] Bankr. L. Rep. (CCH) §71,218, at 98,300 (1st Cir. Jun. 30, 1986); *In re Davis*, 730 F.2d 176, 184 (5th Cir. 1984).

13. *See generally* Restatement (Second) of Torts §886A (1977) ("Contribution Among Tortfeasors").

from this finding that the subsequent conclusion by the District Court that Piccinin's claims against Aetna were within its jurisdiction as "related to" the bankruptcy (A.9) was correct, and was properly affirmed by the Court of Appeals. *See A.H. Robins, supra*, 788 F.2d at 1007-09 (A.34-37).

2. The District Court Has Properly Exercised Its Jurisdiction Over Piccinin's Claims By Transferring Them To Itself As The District Court In Which The Bankruptcy Is Pending.

As the District Court has bankruptcy jurisdiction over Piccinin's claims against Aetna, its exercise of its jurisdiction by transferring to itself those claims — and others like them — was a proper use of discretionary powers. Piccinin's claims are concededly "personal injury tort claims." 28 U.S.C. 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried *in the district court in which the bankruptcy case is pending*, or in the district court in the district in which the claim arose, *as determined by the district court in which the bankruptcy case is pending*.

(emphasis added). As the Court of Appeals stated, "[u]nquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases." 788 F.2d at 1010 (A.40).

a. Piccinin's Argument Against The Transfer Of Her Claims To The District Court Is Without Merit.

Piccinin seeks to escape §157(b)(5) by arguing that the section is inapplicable to her because she has filed no claim in the bankruptcy court. This argument, which would allow any claimant with a personal injury action against a debtor to escape the exercise of bankruptcy jurisdiction at will, must be rejected. "Congress intended the definition of a claim to be very broad." *In re M. Frenville Co.*, 744 F.2d 332, 336 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 911 (1985). The legislative history of the Bankruptcy Reform Act of 1978 states:

> The definition [of a claim] is any right to payment, whether or not reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. . . . By this broadest possible definition and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that *all legal obligations of the debtor, no matter how remote or contingent*, will be able to be dealt with in the bankruptcy case. It permits the *broadest possible relief* in the bankruptcy court.

H.R. Rep. No. 595, 95th Cong., 2d Sess. 309, *reprinted in*, 1978 U.S. Code. Cong. & Ad. News 5963, 6266 (emphasis added). *See also* S. Rep. No. 989, 95th Cong., 2d Sess. 21, *reprinted in*, 1978 U.S. Code Cong. & Ad. News 5785, 5807-08 (essentially identical statement).[14]

Piccinin's argument is also without support in the cases. She relies on *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985), but as the Court of Appeals for the Fourth Circuit pointed out, *White Motor* held only that

> the district court had the power under the statute to allow products liability cases to be tried where the claim arose; there was nothing in the opinion, however, that declared that such action was mandated or even preferred.

788 F.2d at 1010 (A.40).[15]

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14. The judicial response to mass tort bankruptcy claims is also incompatible with Piccinin's contention. In *In re Johns-Manville Corp.*, 57 Bankr. 680, 690 (Bankr. S.D.N.Y. 1986), the court specifically held that "for federal bankruptcy purposes, a prepetition 'claim' . . . encompasses a cause of action"). In *In re Amatex*, 755 F.2d 1034 (3d Cir. 1985), the court of appeals allowed appointment of a *guardian ad litem* to represent claimants whose asbestos injuries had not even happened yet; and who, by reason of that fact, had not filed claims.

15. Piccinin also relies upon the *White Motor* court's ambigious reference to defendants who "cannot be transferred out of the jurisdiction." 761 F.2d at 273-74. However, Piccinin has no standing to raise personal jurisdiction claims that Robins' co-defendants have themselves waived. Second, at least as to Aetna, it is a nationwide corporation that does business in the Eastern District of Virginia, unlike individual defendants in automobile accident cases.

b. The District Court's Transfer Of Piccinin's Claims Is In The Interest Of The Bankrupt, All Claimants And The Public Generally.

Given that the District Court unquestionably has discretionary power under 28 U.S.C. §157(b)(5) either to transfer Piccinin's claims or not, the issue before the Court of Appeals was whether, in deciding to transfer the claims, the District Court had abused its discretion. The Court of Appeals had no difficulty reaching the conclusion, not only that there has been no abuse of discretion, but that the District Court's action is in the interests of all concerned — Robins as the bankrupt, all the claimants and the public generally. 788 F.2d at 1013-14 (A.46).

The Court of Appeals found ample reason to affirm the District Court's exercise of discretion. The District Court's order was temporary only. *Id.* at 1011 (A.42). Since the Dalkon Shield litigation began, "over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims." *Id.* at 1013 (A.45). "It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried," and that "it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately." *Id.* (A.45). Reorganization — "the first and primary purpose of the proceedings," *id.* at 1012 (A.44), — could not be accomplished unless the claims were first evaluated, but no progress in that direction was possible "until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized." *Id.* at 1014 (A.46). "This unquestionably was the idea which prompted" the District Court's order transferring Piccinin's claims and others like them. *Id.* (A.46) The Court of Appeals therefore held: "We approve of the order and find it conducive of the interests of all concerned." *Id.*[16]

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16. The Court of Appeals further expressed its approval in the passage quoted at length in the Statement of Facts, *supra*, at 6-7. As there explained, the temporary centralization of all claims, including Piccinin's, is essential to the formulation of "a reasonable and fair reorganization [of Robins]"

Piccinin's petition sets forth no facts to overcome the practical considerations that so strongly support the District Court's exercise of discretion in this case. Indeed, the basis of her petition is difficult to discern; as she is a citizen of the United Kingdom residing in Italy who brought suit over an injury that took place in England, no valid reason appears why her action should be tried in Alabama rather than Virginia.[17]

B. The District Court Has Properly Exercised Its Discretion In Staying Prosecution Of All Claims Related To The Bankruptcy, Including Piccinin's Claims, Pending The Formulation Of A Plan Of Reorganization And A Procedure For The Just Settlement Of All Claims.

As noted above, the District Court, in addition to transferring Piccinin's claims against Aetna, has temporarily enjoined[18] Piccinin from prosecuting her claims pending the formulation of a plan of reorganization. Piccinin contends that this action is "contrary to law." Petition at 33. This contention depends on her objection to the transfer of her claims, that is to say, her attack upon the District Court's temporary centralization of all Dalkon Shield litigation as "related to" the bankruptcy. As discussed above, centralization of the Dalkon Shield claims is in the interest of all concerned — Robins, the claimants and the public

NOTES *(Continued)*

possible step in working out a mechanism" for settling the claims "without burdening the estate with the tremendous expense of endless litigation and reducing if not exhausting, the assets available for paying those claims." *Id.* at 1013-14 (A.46).

17. Piccinin's additional argument that she lacks minimum contacts with Virginia is irrelevant. As a United Kingdom citizen resident in Italy who was injured in England, she has no contacts (apart from her lawyers' preference) with any American jurisdiction. As a plaintiff, she is not subject to minimum contacts analysis. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-80 (1984). Moreover, Bankruptcy Rule 7004(d) provides for nationwide service of process, and Piccinin does not dispute contact with the United States.

18. The stay entered by the District Court is analogous to a temporary injunction and is reviewable on an abuse of discretion standard. *In re Johns-Manville Corp.*, 40 Bankr. 219, 226, 228 (S.D.N.Y. 1984). *See generally Foust v. Munson Steamship Lines*, 299 U.S. 77 (1936).

generally. Given the full treatment of this point by the Court of Appeals, referred to in the preceding portion of this Argument, further comment may be brief.[19]

Piccinin does not appear seriously to contest that a court sitting in bankruptcy has broad jurisdiction to enjoin the commencement or continuation of an action against non-bankrupt parties. 11 U.S.C. §105(a).[20] Rather, she interprets certain asbestos cases[21] as imposing a absolute rule prohibiting stays of litigation against persons alleged to be joint tortfeasors with a debtor. That interpretation is incorrect since in none of the cases on which Piccinin relies did the court impose any rigid rule.

In the asbestos cases to which Piccinin refers, the co-defendants seeking the stay in each case were, like the debtors, manufacturers or distributors of the product that allegedly caused plaintiffs' injuries. As manufacturers, they could be independently liable to the plaintiffs for their own products without regard to the debtors' conduct. In such circumstances, courts have generally viewed the balance of hardships as tilting towards severance and continued litigation.

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19. Piccinin's claim that she is being denied a jury trial is facially meritless. As the Court of Appeals recognized, the District Court's orders do not foreclose trial of her claims. "This is not to say the personal injury claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim." 788 F.2d at 1012 (A.46). The District Court's November 9, 1985 Order explicitly provides that "such action[s] shall be tried" (A.9). Indeed, as described in the Statement of Facts, *supra*, at 8, preparation for possible trial of allegations against Aetna is moving forward. *See Breland v. Aetna Casualty & Surety Co.*, No. 86-0315-R, Initial Pre-Trial Order (E.D. Va. Jul. 7, 1986) (A.52).

20. Section 105(a) provides that "[t]he court may issue any order . . . that is necessary or appropriate to carry out the provisions of this title."

21. *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775 (11th Cir. 1984); *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124 (4th Cir. 1983); *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194 (6th Cir. 1983); *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541 (5th Cir. 1983); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1 (1st Cir.), *cert. dismissed*, 463, U.S. 1247 (1983); *Pitts v. Unarco Industries, Inc.*, 698 F.2d 313 (7th Cir. 1983); *Cf. Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324 (10th Cir. 1984) (not asbestos case). *See* Petition at 27-29.

However, as the Court of Appeals discussed at length, there are other asbestos cases presenting different fact patterns. Other classes of asbestos co-defendants have sought stays where the claims brought against them were based expressly on activities undertaken by them on behalf of a debtor. In such cases the balance is different and stays have been granted. *See* 788 F.2d at 1004-07 (discussing *In re Johns-Manville Corp.*, 26 Bankr. 420 (Bankr. S.D.N.Y. 1983)) (A.28-34). *See also In re Johns-Manville Corp.*, 40 Bankr. 219 (S.D.N.Y. 1984) (affirming stay order issued in 26 Bankr. 420).

This case is like the latter type of asbestos case, not like the cases cited by Piccinin. Aetna did not manufacture any product. The conspiracy and agency allegations Piccinin makes against Aetna are not readily severable from the allegations she makes against Robins.[22] As already discussed, Piccinin's proof and Aetna's defense would necessarily entail extensive discovery and trial testimony from Robins personnel. To sever such claims and permit their multiple prosecution would result in diversion and dissipation of Robins' resources, impeding if not frustrating its reorganization.[23] In the asbestos cases on which Piccinin relies no such consequences were present. Furthermore, Aetna's insurance coverage is an important asset of the estate that would be subject to contribution and setoff should judgments against Aetna be entered on claims such as Piccinin's.[24] Again, the as-

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22. *Accord, e.g., In re Samoset Associates*, 654 F.2d 247, 253-54 (1st Cir. 1981); *Federal Life Insurance Co. v. First Financial Group, Inc.*, 3 Bankr. 375, 376 (S.D. Tex. 1980); *In re MacDonald/Associates, Inc.*, 54 Bankr. 865, 869 (Bankr. D.R.I. 1985); *In re Johns-Manville Corp.*, 26 Bankr. 405, 417-18 (Bankr. S.D.N.Y 1983).

23. *Accord, e.g., In re UNR Industries, Inc.*, 45 Bankr. 322, 326-27 (N.D. Ill. 1984); *In re Johns-Manville Corp.*, 40 Bankr. 219, 223-25 (S.D.N.Y. 1984); *In re MacDonald/Associates, Inc.*, 54 Bankr. 865, 870 (Bankr. D.R.I. 1985); *In re Arrow Huss, Inc.*, 51 Bankr. 853, 859 (Bankr. D. Utah 1985).

24. *Accord, e.g., Tringali v. Hathaway Machinery Co.*, [1986] Bankr. L. Rep. (CCH) ¶71,218 at ¶89,300-01 (1st Cir. Jun. 30, 1986); *In re Johns-Manville Corp.*, 40 Bankr. 219, 229 (S.D.N.Y 1984); *In re Johns-Manville Corp.*, 57 Bankr. 680, 691-92 (Bankr. S.D.N.Y 1986); *In re MacDonald/Associates, Inc.*,

bestos cases on which Piccinin relies did not involve any such facts.

There is, in short, no conflict between this case and Piccinin's asbestos cases; there are only different facts. As the Court of Appeals observed, on the facts of *this* case, "[i]t seems incontestable that, if the suits [Piccinin's and others like it] are permitted to continue and discovery allowed, any effort at reorganization of the debtor will be frustrated, if not permanently thwarted." 778 F.2d at 1008 (A.36). "Certainly," the Court of Appeals concluded, "the district court did not commit an abuse of discretion in granting the injunction herein." *Id.* (A.36).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN G. HARKINS, JR.*
JAN Z. KRASNOWIECKI
EDMUND B. SPAETH, JR.
JAMES M. BECK
Pepper, Hamilton & Scheetz
2001 The Fidelity Building
123 South Broad Street
Philadelphia, PA 19109-1083
(215) 893-3000

Attorneys for Respondent
AETNA CASUALTY & SURETY COMPANY

*Counsel of record for Respondent Aetna Casualty & Surety Company upon whom service is to be made.

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54 Bankr. 865, 869-70 (Bankr. D.R.I. 1985); *See also Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 548 (5th Cir. 1983) (no abuse of discretion to prevent prosecution of direct actions against debtor's insurer).

APPENDIX

APPENDIX A

STATUTES INVOLVED

11 U.S.C. §105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

11 U.S.C. §541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

28 U.S.C. §157. Procedures

(b)(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. §1334. Bankruptcy cases and proceedings

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re:	) Chapter 11
A. H. ROBINS COMPANY, INCORPORATED,	) Case No. 85-01307-R
Debtor.	)
Employer's Tax Identification No. 54-0486348	)
A. H. ROBINS COMPANY, INCORPORATED,	) Adversary Proceeding) No. 85-1006-R
Plaintiff,	)
v.	)
NANCY CAMPBELL, KATHRYN CONRAD, JEANETTE DICHARRY and VERNON DICHARRY, ANNA PICCININ, LUISA MOSA and JACK MOSA, STELLA J. CAMP and JOHN H. CAMP, HELEN BARNETT and MICHAEL BARNETT, and EDNA LINDSEY RUMINSKI,	) (Retained Proceeding)
Defendants.	)

ORDER FOR PRELIMINARY INJUNCTION

This cause came on to be heard on plaintiff's motion for preliminary injunction. The Court having considered plaintiff's complaint, the memorandum of law and the declarations in support of the motion and the papers filed in opposition thereto and, having heard testimony and argument and considered the evidence presented, the Court adopts its remarks and rulings as

stated from the bench and makes the following findings of fact, conclusions of law, and order for a preliminary injunction pursuant to Bankruptcy Rule 7065 and Federal Rule of Civil Procedure 65(d), all objections by opposing counsel being duly preserved:

Findings of Fact

As of August 21, 1985, the plaintiff in this action, A. H. Robins Company, Incorporated ("Robins") was named as the defendant in approximately 5,000 civil actions in state and federal courts throughout the country alleging injuries and seeking damages stemming from Robins' manufacture and marketing of the Dalkon Shield intrauterine contraceptive device. Pursuant to 11 U.S.C. Section 362(a), all litigation against Robins in those approximately 5,000 civil actions was stayed automatically on August 21, 1985 upon filing of Robins' petition for protection from its creditors under Chapter 11.

Approximately 2,400 of those civil actions name persons or entities other than Robins as co-defendants. Those approximately 2,400 civil actions seek damages from Robins co-defendants based upon theories of liability which are derivative of or interrelated with the causes of action or claims for relief asserted against Robins. Any judgment rendered against a Robins co-defendant in any one of those approximately 2,400 civil actions could result in a claim against Robins for either contractual indemnity or commonlaw contribution. Although Robins may be entitled to relitigate the issue of its liability to each indemnity or contribution claim, the burden on Robins' estate of such litigation would significantly impede Robins' reorganization and render any plan of reorganization futile.

Moreover, many of those 2,400 civil actions against the co-defendants would require the participation of Robins' officers, executives and employees as witnesses and in pre-trial and post-trial proceedings. The diversion of Robins' key personnel from the reorganization effort which would result from continuation of litigation in those 2,400 civil actions would impair Robins' reorganization effort and would be contrary to the public interest.

The continuation of litigation in those 2,400 civil actions which name Robins' co-defendants poses a significant threat to Robins' reorganization effort and could cause a direct and substantial drain upon the assets of Robins' Chapter 11 estate. If this relief sought is not granted, a rush to judgment will likely ensue. Such a race to obtain judgments against Robins' co-defendants would be detrimental to the debtor and would adversely affect Robins' reorganization effort.

Any rejection by the debtor of its contractual duty to indemnify its officers, directors, and employees would adversely affect the debtor and would not be consistent with the debtor's reorganization under Chapter 11.

Defendant Nancy Campbell has a civil action pending in the United States District Court for The Western District of Wisconsin. In her complaint Ms. Campbell asserts claims against Robins, The Aetna Casualty and Surety Company, E. Claiborne Robins, Sr., E. Claiborne Robins, Jr. and Dr. Hugh J. Davis. Ms. Campbell seeks recovery from those defendants under theories of negligence, strict liability, implied and express warranties, misrepresentation, fraud and under the Racketeer Influcenced and Corrupt Organization Act ("RICO"). The continuation of litigation in the Campbell Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Kathryn Conrad has a civil action pending in the Circuit Court for Baltimore City. In her complaint, Ms. Conrad asserts claims against Robins, Dr. Hugh J. Davis and Dr. Frederick A. Clark, Jr. Ms. Conrad seeks recovery from those defendants under theories of negligence, strict liability, fraudulent misrepresentation and conspiracy. The continuation of litigation in the Conrad action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Jeanette Dicharry and Vernon Dicharry have a civil action pending in The United States District Court for the Eastern District of Louisiana. In their complaint, the Dicharrys assert claims against Robins and Aetna Casualty and Surety

Company (served herein as Aetna Life and Casualty). The Dicharrys seek recovery from those defendants under theories of strict liability, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Dicharry Action against Aetna Casualty and Surety Company threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Anna Piccinin has a civil action pending in The United States District Court for The Middle District of Alabama. In her complaint, Ms. Piccinin asserts claims against Robins and The Aetna Casualty and Surety Company. Ms. Piccinin seeks recovery from those defendants under theories of conspiracy, fraud, negligence, misrepresentation and breach of warranty. The continuation of litigation in the Piccinin Action against The Aetna Casualty and Surety Company will impair and impede the debtor's reorganization effort.

Defendants Luisa Mosa and Jack Mosa have a civil action pending in The United States District Court for the District of Maryland. In their complaint, the Mosas assert claims against Robins and Dr. Hugh J. Davis. The Mosas seek recovery from those defendants under theories of fraud and deceit, involuntary testing and battery, negligence, strict liability, breach of warranty, violation of the Federal Food and Drug Act and conspiracy. The continuation of litigation in The Mosa Action against Dr. Hugh J. Davis threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendants Stella J. Camp and John H. Camp have a civil action pending in The Circuit Court for Madison County, Alabama. In their complaint, the Camps assert claims against Robins, D.L.K., Incorporated and John or Jane Does numbers three through nine. The Camps seek recovery from those defendants under theories of negligence, strict liability, misrepresentation, breach of warranty, conspiracy and fraud. The continuation of litigation in The Camp Action against any of Robins' co-defendants threatens to impair and impede the debtor's reorganization effort.

Defendants Helen Barnett and Michael Barnett have a civil action pending in the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida. In their complaint, the Barnetts assert claims against Robins, Aetna Casualty and Surety Company, Florida Physicians Supply, Incorporated and Medical Supply Company of Jacksonville. The Barnetts seek recovery from those defendants under theories of willful negligence, fraud and misrepresentation, violation of State and Federal Food and Drug Acts, strict liability, breach of warranty and battery. The continuation of litigation in the Barnett Action against any of Robins' co-defendants threatens property of the debtor's estate and threatens to impair and impede the debtor's reorganization effort.

Defendant Edna Lindsey Ruminski has a civil action pending in the Superior Court for the Judicial District of New Haven, Connecticut. In her complaint, Ms. Ruminski asserts claims against Robins and Dr. Marshall R. Holley. Ms. Ruminski seeks recovery from those defendants under theories of negligence. The continuation of litigation in the Ruminski Action against Dr. Marshall R. Holley threatens to impair and impede the debtor's reorganization effort.

The eight civil actions described above are representative examples of similar civil actions among the approximately 2,400 civil actions currently pending against Robins which name persons or entities other than Robins as co-defendants. The continuation of litigation in those approximately 2,400 civil actions against the various categories of co-defendants represented by the eight civil actions described above would pose a serious threat to the success of the debtor's reorganization and is contrary to the public interest.

Conclusions of Law

The District Court exercising its jurisdiction under 28 U.S.C. Sections 1334(b) and (d), has the authority pursuant to 11 U.S.C. Section 105 and 28 U.S.C. Section 1651, to stay all actions which adversely affect the estate of the debtor and the

debtor's reorganization effort and to stay all actions which will impair and impede the debtor's reorganization effort.

Robins has established that the likelihood of irreparable harm to Robins if this injunction is not granted outweighs the likelihood of irreparable harm to the defendants if the injunction is granted.

Robins has established the likelihood of its success on the merits and the likelihood of a successful reorganization if it is not burdened by continued litigation against it and its co-defendants.

Robins has established that the granting of this preliminary injunction is in the public interest.

The conclusions of law contained in this order constitute the law of this case and shall be applied with equal force to all defendants similarly situated who are brought to the attention of this court.

To the extent any of the foregoing conclusions of law constitute findings of fact, they are to be deemed as such, and vice-versa.

Order

Based upon the foregoing, and good cause appearing therefor, it is hereby

DECLARED all available proceeds of liability insurance issued to Robins are property of the debtor's estate pursuant to 11 U.S.C. Section 541 and any civil action seeking a judgment that might be satisfied from the proceeds of that insurance is automatically stayed pursuant to 11 U.S.C. Section 362(a);

ORDERED defendant Nancy Campbell is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-C-230-S currently pending in the United States District Court for the Western District of Wisconsin; and further

ORDERED defendant Kathryn Conrad is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85231036 currently pending in the Circuit Court for the City of Baltimore, State of Maryland; and further

ORDERED defendants Jeanette Dicharry and Vernon Dicharry are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 85-1243 currently pending in the United States District Court for the Eastern District of Louisiana; and further

ORDERED defendant Anna Piccinin is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-H-9120-N currently pending in the United States District Court for the Middle District of Alabama; and further

ORDERED defendants Luisa Mosa and Jack Mosa are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. H82-49 currently pending in the United States District Court for the District of Maryland; and further

ORDERED defendants Stella J. Camp and John H. Camp are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-85-671-W currently pending in the Circuit Court for Madison County, State of Alabama; and further

ORDERED defendants Helen Barnett and Michael Barnett are enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. 83-5426 currently pending in the Circuit Court for the Ninth Judicial District, Orange County, State of Florida; and further

ORDERED defendant Edna Lindsey Ruminski is enjoined and restrained from continuing with litigation against any of the defendants named in Civil Action No. CV-81-0209979-S currently pending in the Superior Court for the Judicial District of New Haven, State of Connecticut.

This injunction shall remain in force until further order of this Court.

DATED: October 11, 1985
Nunc pro tunc 10-9-85

/s/ ROBERT R. MERHIGE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

Case No. 85-01307-R
Retained Proceeding
(Judge Merhige)

In Re A. H. ROBINS COMPANY, INCORPORATED
Debtor
EMPLOYER'S TAX IDENTIFICATION NO. 54-0486348

ORDER PURSUANT TO 28 U.S.C. SECTIONS 157(b)(5) AND 1334(b) AND 11 U.S.C. SECTION 105(a)

Upon the motion of A. H. Robins Company, Incorporated ("Robins"), for orders pursuant to 28 U.S.C. Sections 157(b)(5) and 1334(b), and 11 U.S.C. Section 105(a) for determination of trial venue, identification of cases "related to" this Chapter 11 case and transfer of cases; the Court having considered the motion, the memorandum of law, the Statement of Financial Affairs For Debtor Engaged in Business Question 12 (Exhibit 1), and having heard the arguments of counsel and good cause appearing therefor, it is hereby

ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins or any other defendant that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further

ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further

ORDERED that all actions related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court; and it is further

ORDERED that nothing contained herein shall affect or limit the power of this Court to abstain from hearing any particular proceeding under Section 1334(c)(1) of the United States Code or remanding any particular proceeding under Section 1452(b) of the United States Code.

/s/ ROBERT R. MERHIGE, JR.
U.S. District Judge

DATED: November 9, 1985

We ask for this:

/s/ CLIFFORD W. PERRIN, JR.

William R. Cogar
Clifford W. Perrin, Jr.
Mays, Valentine, Davenport
& Moore
Post Office Box 1122
Richmond, Virginia 23208

Patrick A. Murphy
Penn Ayers Butler
Murphy, Weir & Butler
101 California Street, 39th Floor
San Francisco, California 94111

A. H. ROBINS COMPANY,
INCORPORATED,

Appellee,

v.

Anna PICCININ

Appellant,

and

Nancy Campbell, Kathryn Conrad, Jeanette Dicharry, Vernon Dicharry, Luisa Mosa, Stella J. Camp, John H. Camp, Helen Barnett, Michael Barnett, and Edna Lindsey Ruminski, Defendants.

Aetna Casualty and Surety Company,

Intervenor/Appellee.

In re A. H. ROBINS COMPANY, INCORPORATED

Debtor.

A. H. ROBINS COMPANY, INCORPORATED,

Appellee,

v.

COMMITTEE REPRESENTATIVES OF
DALKON SHIELD CLAIMANTS,

Appellants.

AETNA CASUALTY AND SURETY COMPANY,

Intervenor/Appellee.

In re A. H. ROBINS COMPANY, INCORPORATED,

Debtor.

A. H. ROBINS COMPANY, INCORPORATED,

Appellee,

v.

KATHRYN CONRAD, LUISA AND JACK MOSA,

Appellants.

In re A. H. ROBINS COMPANY, INC.,

Debtor.

A. H. ROBINS COMPANY, INC.,

Appellee,

v.

ANNA PICCININ,

Appellant.

Nos. 85-2183 to 85-2186.

United States Court of Appeals,
Fourth Circuit.
Argued Dec. 3, 1985.
Decided April 10, 1986.
Rehearing Denied May 14, 1986.

Debtor sought preliminary injunction restraining prosecution of products liability actions against codefendants. The United States District Court for the Eastern District of Virginia, Robert R. Merhige, Jr., J., granted preliminary injunction, and products liability plaintiffs appealed. The Court of Appeals, Donald Russell, Circuit Judge, held that: (1) debtor was entitled to preliminary injunction, and (2) district court had jurisdiction to fix venue for trial of all products liability cases and provide for transfer of cases to district in which bankruptcy court was sitting.

Affirmed in part and remanded with directions.

C. Neal Pope (Max R. McGlamry, Pope, Kellogg, McGlamry, Kilpatrick & Morrison, Atlanta, Ga., Robert L. Dolbeare, Richmond, Va., on brief), for appellant Anna Piccinin.

H. Robert Erwin, Jr. (Pretl & Schultheis, P.A., Baltimore, Md., on brief) for appellants Kathryn Conrad, Luisa Mosa and Jack Mosa.

Mark C. Ellenberg (Murray Drabkin; Cadwalader, Wickersham & Taft, Washington, D.C., George B. Little, L.B. Cann, III, Little, Parsley & Cluverius, P.C., Richmond, Va., on brief), for appellant Committee of Representatives of Dalkon Shield Claimants.

Patrick A. Murphy (Penn Ayers Butler, Michael Kip Maly, Murphy, Weir & Butler, San Francisco, Cal., William R. Cogar, Bradfute W. Davenport, Jr., Clifford W. Perrin, Jr., James S. Crockett, Jr., Mays, Valentine, Davenport & Moore, Richmond, Va., on brief), for appellee.

Jan Z. Krasnowiecki, Pepper, Hamilton & Scheetz, Philadelphia, Pa., for intervenor.

Before RUSSELL and CHAPMAN, Circuit Judges, and SWYGERT, Senior Circuit Judge of the United States Court of Appeals for the Seventh Circuit, sitting by designation.

DONALD RUSSELL, Circuit Judge:

Confronted, if not overwhelmed, with an avalanche of actions filed in various state and federal courts throughout the United States by citizens of this country as well as of foreign countries seeking damages for injuries allegedly sustained by the use of an intrauterine contraceptive device known as a Dalkon Shield,[1] the manufacturer of the device, A.H. Robins Company, Incorporated (Robins) filed its petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§101 *et seq.*, August, 1985.

Background

The device, which is the subject of these suits, had been developed in the 1960's by Dr. Hugh Davis at the Johns Hopkins Hospital in Baltimore, Maryland.[2] In mid-1970 Robins acquired all patent and marketing rights to the Dalkon Shield and engaged in the manufacture and marketing of the device from early 1971 until 1974, when it discontinued manufacture and sale of the device because of complaints and suits charging injuries arising allegedly out of the use of the device. The institution of Dalkon Shield suits did not, however, moderate with the discontinuance of manufacture of the device, since Robins did not actually recall the device until 1984.[3] By the middle of 1985, when the Chapter 11 petition was filed the number of such suits arising out of the continued sale and use of the Dalkon Shield device earlier put into the stream of commerce by Robins had grown to 5,000. More than half of these pending cases named Robins as the sole defendant; a co-defendant or co-defendants were named in the

1. For the current FDA regulation on intrauterine devices, *see* 21 C.F.R. §310.502 (1984).

2. Book Note, 99 Harv.L.Rev. 875 (1986) (reviewing Engelmayer and Wagman, *Lord's Justice: One Judge's Battle to Expose the Deadly Dalkon Shield I.U.D.* (1985)).

3. In response to that recall, Engelmayer & Wagman, *supra*, note 2, at 878, n. 8, state that 4,500 women had removed the shield as of August, 1985, at a cost of $1,600,000.

others. Prior to the filing, a number of suits had been tried and, while Robins had prevailed in some of the actions, judgments in large and burdensome amounts had been recovered in others. Many more had been settled.[4] Moreover, the costs of defending these suits both to Robins and to its insurance carrier had risen into the millions. A large amount of the time and energies of Robins' officers and executives was also being absorbed in preparing material for trial and in attending and testifying at depositions and trials. The problems arising out of this mounting tide of claims and suits precipitated this Chapter 11 proceeding.

The filing of the Chapter 11 petition automatically stayed all suits against Robins itself under section 362(a) of the Bankruptcy Code, even though no formal order of stay was immediately entered. *See In re Larmar Estates*, 5 B.R. 328, 330 (Bankr. E.D.N.Y. 1980). But a number of plaintiffs in suits where there were defendants other than Robins, sought to sever their actions against Robins and to proceed with their claims against the co-defendant or co-defendants. Robins responded to the move by filing an adversary proceeding in which it named as defendants the plaintiffs in eight such suits pending in various state and federal courts. In that proceeding, the debtor sought (1) declaratory relief adjudging that the debtor's products liability policy with Aetna Casualty and Insurance Company (Aetna) was an asset of the estate in which all the Dalkon Shield plaintiffs and claimants had an interest and (2) injunctive relief restraining the prosecution of the actions against its co-defendants. Service of the summons and complaint in that adversary proceeding, a memorandum of law in support of the motion for a preliminary injunction therein, a notice of the debtor's intention to apply for a temporary restraining order, a copy of the proposed temporary restraining order and affidavits in support were duly mailed by

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4. Engelmayer & Wagman, *supra*, note 2, at 876, n. 6, state that of the approximately 7,500 Dalkon Shield cases settled from 1972 to February 1985, fewer than 40 went to a jury.

A recent article in the Nat. L.J., p. 10 (March 17, 1986), states that by mid 1985, Robins, along with its insurer, Aetna Casualty & Surety Company, "had paid roughly $517 million for 25 trial judgments and 9,300 settlements since the first verdict in 1975."

first-class mail and by Federal Express to all the defendants and their attorneys at their addresses. *See* Bankruptcy Rule 7004 and Rule 4, Fed.R.Civ.P.

The debtor's application for a temporary restraining order and for the setting of a date for a hearing on the request for preliminary injunction in the adversary proceeding was heard *ex parte* by the district judge who had jurisdiction over the proceedings.[5] The district judge granted at the time a temporary restraining order in the proceedings and set a hearing on the debtor's application for a preliminary injunction. On that same day, Robins mailed by first-class mail and by Federal Express to all the defendants and their attorneys at their addresses "Notice of Hearing on Plaintiff's Motion for Preliminary Injunction."

At the hearing on the motion for a preliminary injunction, a number of defendants as well as the Committee constituted by the court to represent Dalkon Shield Claimants appeared by counsel.[6] At the commencement of the hearing the defendant Piccinin, a plaintiff in one of the Dalkon Shield actions which Robins sought to stay, filed through her attorney a written motion to dismiss as against her. No other defendant filed a motion in response to the motion for a preliminary injunction. After receiving certain testimony, admitting various records, and hearing arguments of parties, the district court granted Robins' request for a preliminary injunction.

In his order granting the preliminary injunction, the district judge found (1) that continuation of litigation in the civil actions threatened property of Robins' estate, burdened and impeded Robins' reorganization effort, contravened the public interest,

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5. Section 104 of the 1984 Amendments to the Bankruptcy Code provides that "[i]n each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for the district. Each bankruptcy judge . . . may exercise the authority conferred under this chapter . . . except as otherwise provided by law or by rule or order of the district court."

6. For a discussion of the authorization for and responsibilities of such Committees, *see* Note. *The Chapter 11 Creditors' Committee; Statutory Watchdog?* 2 Bankr.Dev.J., 247 (1985)).

and rendered any plan of reorganization futile; (2) that this burden on Robins' estate outweighed any burden on the Dalkon claimants caused by enjoining their civil actions; and (3) that all remaining insurance coverage in favor of the debtor under its liability policy issued by Aetna was property of the Robins' Chapter 11 estate. The district judge then held that all actions for damages that might be satisfied from proceeds of the Aetna insurance policy were subject to the stay pursuant to 11 U.S.C. §362(a)(3) and enjoined further litigation in the eight civil actions, pursuant to 11 U.S.C. §362(a)(1), (3) as supplemented by 11 U.S.C. §105.

Only the defendants Piccinin, the Mosas, and Conrad filed timely notices of appeal from the grant of the preliminary injunction. Their appeals, questioning the propriety of that preliminary injunction as against suits by Robins' co-defendants is the first of the issues now before this Court.

Some three weeks after entry of the preliminary injunction, Robins filed a motion for (1) a determination of trial venue of all Dalkon Shield suits, (2) identification of such Dalkon Shield cases as were "related to" the Chapter 11 case, and (3) transfer of such cases to the Eastern District of Virginia for trial. It also requested an expedited hearing on these motions. This request for an expedited hearing was granted and the expedited hearing was set ten days later. Notice of the hearing was given the Representatives of the Dalkon Shield Claimants Committee and the Unsecured Creditors Committee. The Committees and the defendants Piccinin, the Mosas and Conrad appeared by counsel at the hearing and joined in entering objections to the motion.

After a hearing on the motions, the district judge entered an order holding that (1) pursuant to 28 U.S.C. §1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to this Chapter 11 case over which this court had jurisdiction; (2) pursuant to 28 U.S.C. §§157(b)(5)[7] and 1334(b), all such actions,

7. In Chatz & Schumm, *1984 Bankruptcy Code Amendments—Fresh from the Anvil*, 89 Com. L.J., 317, 319-20 (1984), the authors refer to these two sections as the "critical sections" of the Amendments, establishing as they do what "a bankruptcy court can and cannot do."

wherever pending, were to be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; (3) all actions related to the Robins' Chapter 11 case now pending in any federal district court or subsequently removed to any federal district court, during the pendency of this Chapter 11 case, were to be transferred to this court [the Richmond Division of the United States District Court]; and (4) nothing in the order limited the power of this court [the Richmond Division of the United States District Court] later to abstain from hearing any proceeding under section 1334(c)(1) or remanding under section 1452(b), 28 U.S.C.

From this order, the Committee of Representatives of Dalkon Shield Claimants and the defendant Piccinin have appealed.[8] This appeal poses the second issue on appeal.

I.

The initial question in the appeal of the first issue relates to the court's jurisdiction to grant a stay or injunction of suits in other courts against co-defendants of the debtor or of third parties; none of the parties herein contest the jurisdiction of the bankruptcy court to stay actions against the debtor itself in any court. Jurisdiction over suits involving co-defendants or third-parties may be bottomed on two statutory provisions of the Bankruptcy Act itself as well as on the general equitable powers of the court. The first of these statutory grants of jurisdiction is found in section 362, 11 U.S.C. The purpose of this section by its various subsections is to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, to preclude one creditor from pursuing a remedy to the disadvantage of other creditors, and to provide the debtor and its executives with a reasonable respite from protracted litigation, during which they may have an opportunity to formulate a plan of reorganization for the debtor. *Matter of Holtkamp*, 669 F.2d 505, 508 (7th Cir. 1982). As the Court in *Fidelity Mortg. Investors v. Camelia Builders, Inc.*, 550 F.2d 47,

8. An order of the Honorable H. Emory Widener, Jr., after a motion for a stay pending appeal, permitted Aetna to intervene. Aetna appears in the appeal.

55 (2d Cir. 1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1107, 51 L.Ed.2d 540, put it, "[t]he stay insures that the debtor's affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors' interests with one another."

Section 362 is broken down into several subsections, only two of which are relevant on this appeal. The first of such subsections is (a)(1), which imposes an automatic stay of any proceeding "commenced or [that] could have been commenced against the debtor" at the time of the filing of the Chapter 11 proceeding; the second is (a)(3), which provides similar relief against suits involving the possession or custody of property of the debtor, irrespective of whether the suits are against the debtor alone or others. We shall discuss the extent of jurisdiction given the bankruptcy court under these two subsections, beginning with (a)(1).

(a)

Subsection (a)(1) is generally said to be available only to the debtor, not third party defendants or co-defendants. The rationale for this narrow construction of the statute has been stated in *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1196-97 (6th Cir.1983), and in our own case of *Williford v. Armstrong World Industries, Inc.*, 715 F.2d 124, 126-27 (4th Cir.1983), and it need not be repeated here. However, as the Court in *Johns-Manville Sales Corp.*, 26 B.R. 405, 410 (S.D.N.Y. 1983) remarked, in discussing the oft-cited case, *Royal Trucks & Trailer v. Armadors Meritina Salvadoreana*, 10 B.R. 488, 491, (N.D.Ill.1981),[9] "there are cases [under 362(a)(1)] where a bankruptcy court may properly stay the proceedings against non-bankrupt co-defendants" but, it adds, that in order for relief for such non-bankrupt defendants to be available under (a)(1), there must be "unusual circumstances" and certainly " '[s]omething more than the mere fact that one of the parties to the lawsuit has filed a Chapter 11 bankruptcy must be shown in order that proceedings be stayed against non-bankrupt parties.' " This "unusual situation," it would seem, arises when there is such

9. This case is generally cited on the strict construction of this subsection.

identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor. An illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case. To refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute. This fact was recognized by the court in *In Re Metal Center*, 31 B.R. 458 (D.Conn.1983).

In *Metal Center* the third-party plaintiff had been sued, along with the debtor, on his guaranty of the debtor's obligation. The third-party was entitled to be indemnified by the debtor on account of any judgment rendered against him because of his guaranty. While the action against both the debtor and the guarantor was pending, the debtor filed its Chapter 11 petition. The action was stayed against the debtor but the plaintiff sought to continue his suit against the guarantor. The guarantor at this point moved to stay the action as against him. The bankruptcy court reviewed the motion because of the possible "effect upon the debtor of a state court judgment against Gardner [the guarantor]." In discussing the issue, the court first dismissed as inapplicable to the facts of this case the situation where the third-party defendant was "independently liable as, for example, where the debtor and another are joint tort feasors or where the nondebtor's liability rests upon his own breach of duty." It noted that in such a case "the automatic stay would clearly not extend to such non debtor." But, in contrast to those situations, it declared that "where, however, a debtor and nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code." It concluded with the statement: "Clearly the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate," and this is so, whether the debtor is a party or not. 31 B.R. at 462.

It is true that, although the third-party defendant in *Metal Center* was found to be entitled to indemnity from the debtor, the court held that the situation was not such as to qualify for a stay under section 362(a)(1). The court reached this conclusion because in its opinion the judgment in the suit against the third-party would not be binding on the bankruptcy court. Of course, if the indemnitee, who has suffered a judgment for which he is entitled to be absolutely indemnified by the debtor, cannot file and have allowed as an adjudicated claim the actual amount of the judgment he has secured but must submit his claim for allowance in the bankruptcy proceeding with the prospect that his claim may not be allowed in the full amount of the judgment awarded in favor of him, the indemnitee will be unfairly mulcted by inconsistent judgments and his contract of indemnity in effect nullified. We do not accept such reasoning with its shocking result and would find a stay under (a)(1) acceptable. Apparently the court in *Metal Center* recognized the inconsistency and the injustice resulting from its refusal to sustain a stay under (a)(1) for *it did grant a stay* of the action against the third-party but *on equitable grounds*, finding in justification that "severing and remanding [the plaintiff's action against the indemnitee to the state court for trial and judgment would] . . . potentially expose[s] Gardner [the indemnitee] to inconsistent judgments." 31 B.R. at 463. While, as we have said, it seems that a ruling sustaining the stay in that case under section 362(a)(1) would have been more logical and appropriate, it is unimportant whether the stay is granted under section 362(a)(1) or on equitable grounds: the result is the same; a stay is proper in such a situation.

In *Seybolt v. Bio-Energy of Lincoln, Inc.*, 38 B.R. 123 (D.Mass.1984), the issue was similar to that in *Metal Center*, *i.e.*, whether a guarantor entitled to indemnity by the debtor would be entitled to seek a stay under section 362(a)(1). In granting the stay in that case, the Court, after quoting the language of *Metal Center* with respect to the case in which "the liability of the non-debtor is imputed to the debtor by operation of law," said:

> The concept that notice and an opportunity to defend binds the principal on a judgment against a guarantor (in a case in

which the principal did not participate) springs from notions of res judicata. If George Seybolt recovers a judgment against the guarantors in the state court, Bio-Energy Associates' assertion that the $100,000 was not a loan but a contribution to capital may well be rendered moot when the guarantor subsequently asserts a claim against it for indemnity. At the very least, the dual litigation of these issues in the state court and the bankruptcy court is not judicially economic and potentially exposes Bio-Energy, Inc. and Bio-Energy Associates to inconsistent judgments. *See In Re Metal Center, Inc., supra,* at 463.

Accordingly, I find that George Seybolt's claims against the individual guarantors are within this Court's jurisdiction and should be stayed until an appropriate motion for relief from stay is filed and granted by the bankruptcy court. 38 B.R. at 127-28.

In Re Brentano's, 27 B.R. 90 (S.D.N.Y. 1983), also involved the situation of a guarantor of a debtor in a Chapter 11 proceeding who was entitled under contract to indemnity by the debtor against any judgement against him. While the case did not directly concern section 362 but the question of bankruptcy jurisdiction, the language of the court appears relevant on the issue under review here. It said that the action against the guarantor-indemnitee "could and would affect the estate in bankruptcy," since, under the indemnity agreement, "a judgment in favor of the [plaintiff] in the guaranty action would automatically result in indemnification liability against Brentano's" [*i.e.*, the indemnitor]. Accepting this language one would have difficulty in not concluding that the action was in effect one against the debtor and as such would qualify for relief under (a)(1). *Brentano's* is cited and discussed in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984), which was an asbestos case. The issue in *Pacor*, as in *Brentano's*, was one of bankruptcy jurisdiction. The court described the facts in *Brentano's* and stated the resulting legal situation as follows:

> In *Brentano's*, however, it is clear that the action between the landlord and MacMillan could and would affect the estate in bankruptcy. By virtue of the indemnification agreement between Brentano's and MacMillan, a judgment in favor of the landlord on the guarantee action would automatically result in indemnification liability against Brentano's. *See also In re Johnie T. Patton, Inc.*, 12 B.R. 470 (Bankr.D.Nev.1981); *In re Lucasa International, Ltd.*, 6 B.R. 717 (Bankr.S.D.N.Y. 1980); *In re Brothers Coal Co.*, 6 B.R. 567 (Bankr.W.D.Va.1980) (all involving guarantors of debtor's obligations). Moreover, even in the absence of an explicit indemnification agreement, an action by a creditor against a guarantor of a debtor's obligations will necessarily affect that that [sic] the creditor's status vis a vis other creditors, and administration of the estate therefore depends upon the outcome of that litigation. 743 F.2d at 995.

Pacor, however, found *Brentano's* inapplicable in its case because:

> In this case, however, there would be no automatic creation of liability against Manville on account of a judgment against Pacor. Pacor is not a contractual guarantor of Manville, nor has Manville agreed to indemnify Pacor, and thus a judgment in the Higgins-Pacor action could not give rise to any automatic liability on the part of the estate. 743 F.2d at 995.

The clear implication of the decision is that, if there had been a contract to indemnify, a contrary result would have been in order.

(b)

But (a)(1), which stays actions against the debtor and arguably against those whose interests are so intimately intertwined with those of the debtor that the latter may be said to be the real party in interest, is not the only part of section 362 providing for an automatic stay of proceedings. Subsection (a)(3) directs stays of any action, *whether against the debtor or third-parties*, to obtain possession or to exercise control over property of the debtor. A key phrase in the construction and application of this section is, of course, "property" as that term is used in the Act. Section 541(a)(1) of the Bankruptcy Act defines "property" in the bankruptcy context. It provides that the "estate is comprised of all the following property, wherever located . . . all legal or equitable interests of the debtor in property as of the commencement of the case." The Supreme Court in construing this language in *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205, n. 9, 103 S.Ct. 2309, 2313, n. 9, 76 L.Ed.2d 515, quoted this language in the legislative history of the Section:

> The scope of this paragraph [541(a)(1)] is broad. It included all kinds of property including tangible or intangible property, causes of action (see Bankruptcy Act §70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act.

Under the weight of authority, insurance contracts have been said to be embraced in this statutory definition of "property." *In re Davis*, 730 F.2d 176, 184 (5th Cir.1984). For example, even the right to cancel an insurance policy issued to the debtor has uniformly been held to be stayed under section 362(a)(3). Lam, *Cancellation of Insurance: Bankruptcy Automatic Stay Implications*, 59 Am.Bank, L.J., 267 (1985), (extensively reviewing the cases to this effect). A products liability policy of the debtor is similarly within the principle: it is a valuable property of a debtor, particularly, if the debtor is confronted with substantial liability claims within the coverage of the policy in which case the policy may well be, as one court has remarked in a case like the one under review, "the most important asset of [*i.e.*, the debtor's] estate," *In re Johns Manville Corp.*, 40 B.R.

219, 229 (S.D.N.Y.1984). Any action in which the judgment may diminish this "important asset" is unquestionably subject to a stay under this subsection. *In re Johns Manville Corp.*, 33 B.R. 254, 261 (S.D.N.Y.1983). Accordingly actions "related to" the bankruptcy proceedings against the insurer or against officers or employees of the debtor who may be entitled to indemnification under such policy or who qualify as additional insureds under the policy are to be stayed under section 362(a)(3). *Ibid.*[10]

(c)

The statutory power of the bankruptcy court to stay actions involving the debtor or its property is not, however, limited to section 362(a)(1) and (a)(3). It has been repeatedly held that 11 U.S.C. §105 which provides that the bankruptcy court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title," "empowers the bankruptcy court to enjoin parties other than the bankrupt" from commencing or continuing litigation. *In re Otero Mills, Inc.*, 25 B.R. 1018, 1020 (D.N.M.1982).[11] In that case, the Court said:

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10. There is nothing in *In Re White Motor Credit*, 761 F.2d 270, 274 (6th Cir.1985) in any way contrary to this conclusion; in fact, it sustains the construction of the statute adopted by us. In *White*, the parties were in agreement that the products liability insurance was adequate to cover all claims filed but the court cautioned that had this not been so, the result in that case would have been different:

> Were it not for the fact that all parties are in agreement that the insurance coverage is adequate to cover all filed claims, it would be necessary to liquidate all claims before any insurance was paid out; otherwise some claimants would receive an unequal portion of the insurance assets of the debtor.

It is obvious from that statement of the court that *White* actually sustains the result reached by us that, if the liability insurance is inadequate to satisfy in full all claims under the insurance, the actions by claimants should be stayed and the claims should be "liquidated" in the bankruptcy court.

11. There can be no dispute that the Bankruptcy Reform Act of 1978 and like language later in section 1334(b) of the Bankruptcy Amendments of 1984 greatly enlarged the jurisdiction of the bankruptcy courts and were, as stated in the legislative history, intended to "leave no doubt as to the scope of the bankruptcy court's jurisdiction over disputes." H.Rep. No. 95-595, 95th Cong.2d Sess. 445, *reprinted in* 1978 U.S., Code Cong. & Adm.News, 5963,

Appellant cites only one case decided under the 1978 Bankruptcy Code which found that the bankruptcy court lacked [under §105] the power to enjoin parties from pursuing actions against non-bankrupts in state court. *In re Aboussie Brothers Construction Co.*, 8 B.R. 302 (E.D.Mo.1981). In *Aboussie*, the court did not address §105(a), but relied on cases decided under the old Bankruptcy Act to hold that there was no jurisdiction to enjoin parties from pursuing actions which did not involve the bankrupt directly. The pre-1978 Act confined jurisdiction to "the debtor and his property, wherever located." Act of June 22, 1938, ch. 575, §1, 52 Stat. 906 (1938). Under the new Bankruptcy Code, the jurisdictional statute provides that the bankruptcy court shall have jurisdiction "of all civil proceedings arising under title 11 or arising in or related to cases under title 11." 28 U.S.C.A. §1471 (Supp.1982). This broader jurisdictional statute, combined with §105(a),

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6401. Those sections provide jurisdiction in the bankruptcy case over any proceedings arising in or related to a title 11 case. The accepted definition of the "related to" in these statutes is that declared in *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984):

> An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

See also Note, *Selective Exercise of Jurisdiction in Bankruptcy-Related Civil Proceedings*, 59 Tex. L.Rev. 325, 330-31 (1981):

> One can imagine controversies over which the new bankruptcy courts [under 1471(b)] would have jurisdiction even if neither the debtor nor a representative of the estate were a party, and it is difficult to imagine any instance in which a bankruptcy court would not have jurisdiction if the debtor were a party.

It is true that both *Pacor* and the Texas Note were referring to section 1471(b) of the 1978 Act. That section, however, was re-enacted in the exact words of the repealed 1471(b) in section 1334(a) and (b) of the 1984 Act. Therefore, "[t]he jurisdiction conferred on the district court [under the 1984 Act's section 1334(a) and (b)] is exactly the same jurisdiction that was conferred on the district courts under the Bankruptcy Reform Act [of 1978]." Taggart, *The New Bankruptcy Court Systems*, 59 Am.Bank.L.J. 231, 239 (1985). To the same effect, King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand.L.Rev. 675, 677 (1985).

> grants the bankruptcy court power to enjoin parties from proceeding in state court against non-bankrupts where the state proceeding is related to a case arising under Title 11, 25 B.R. at 1020.

In stating the same scope for section 105, the Court in *Johns-Manville Corp.*, 26 B.R. 420, 425 (S.D.N.Y.1983), quoting from 2 Collier on *Bankruptcy* §§362.02 and 362.05 (15th ed. 1982), put the matter thus:

> [Section 362 of the Code] does not attempt to state the jurisdiction of the bankruptcy court with respect to stays and injunctive relief or to determine the boundaries of the exercise of the court's injunctive power.
>
> Section 105 which is the successor to Section 2A(15), gives the court the power to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title.
>
> [T]he exceptions to the automatic stay of §362(a) which are set forth in §362(b) are simply exceptions to the stay which protect the estate automatically at the commencement of the case and are not limitations upon the jurisdiction of the bankruptcy court or upon its power to enjoin. That power is generally based upon §105 of the Code. The court will have ample power to enjoin actions excepted from the automatic stay which might interfere in the rehabilitative process whether in a liquidation or in a reorganization case.

See to the same effect, In Re Landmark, 19 B.R. 556, 559 (N.D.Ohio 1982); *In Re Larmar Estates, Inc.*, 5 B.R. 328, 330-31 (S.D.N.Y.1980).

Accepting that section 105 confers on the bankruptcy court power under its expanded jurisdiction as expressed in section 1471(b) [28 U.S.C.] of the Bankruptcy Reform Act of 1978 and now section 1334(b), 28 U.S.C. of the 1984 Bankruptcy Amendments to enjoin suits against parties in other courts, whether state or federal, it is necessary to mark out the circumstances

under which the power or jurisdiction may be exercised. In *Otero Mills, supra,* the Court approved a ruling that "[t]o so enjoin a creditor's action against a third party, the court must find that failure to enjoin would effect [sic] the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through the third party." 25 B.R. at 1020. In *Johns-Manville,* the Court phrased somewhat fuller the circumstances when section 105 may support a stay:

> In the exercise of its authority under §105, the Bankruptcy Court may use its injunctive authority to "protect the integrity of a bankrupt's estate and the Bankruptcy Court's custody thereof and to preserve to that Court the ability to exercise the authority delegated to it by Congress" [citing authority]. Pursuant to the exercise of that authority the Court may issue or extend stays to enjoin a variety of proceedings [including discovery against the debtor or its officers and employees] which will have an adverse impact on the Debtor's ability to formulate a Chapter 11 plan. 40 B.R. at 226.

(d)

Beyond these statutory powers under section 362 and section 105 to enjoin other actions whether against the debtor or third-parties and in whatsoever court, the bankruptcy court under its comprehensive jurisdiction as conferred by section 1334, 28 U.S.C., has the "inherent power of courts under their general equity powers and in the efficient management of the dockets to grant relief" to grant a stay. *Williford v. Armstrong World Industries, Inc., supra,* 715 F.2d at 127, *Austin v. Unarco Industries, Inc.,* 705 F.2d 1, 5 (1st Cir.1983). In exercising such power the court, however, must "weigh competing interests and maintain an even balance" and must justify the stay "by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford, supra, Metal Center* and *Seybolt,* discussed *supra,* are illustrative of situations in which courts have found sufficient grounds to grant a stay under this power.

(e)

There are thus four grounds on which the bankruptcy court may enjoin suits against the bankrupt or its assets and property. In some instances only one of these grounds may be relevant; in an involved and complex case, several or even all of the grounds may require consideration. The present case is such an involved and complex case. It has a striking similarity to a Chapter 11 proceedings, initially begun in the bankruptcy court of the Southern District of New York, concerning the reorganization of the Johns-Manville Corporation. In that proceeding, which was litigated both in the New York and Louisiana courts, many of the issues posed on this aspect of the case were raised and analyzed by the courts of the two circuits and the decisions resolving such issues present in a practical form the application of the power of a bankruptcy court to stay actions relating to the bankruptcy proceeding against the debtor, its property and their operations. For this reason, it seems pertinent to review the decisions in those proceedings, for their guidance on the resolution of the issue herein. We begin with the initial proceedings in the bankruptcy court of the Southern District of New York.

(f)

Johns-Manville, an asbestos producer, was beset by a mass of suits seeking large awards for damages sustained by reason of asbestos exposure much as has Robins in this case and, after suffering large and burdensome recoveries by plaintiffs and making substantial settlements in many of the cases, filed its Chapter 11 petition in the Southern District of New York in August, 1982. Such filing operated as an automatic stay of all proceedings against Johns-Manville. However, many of the thousands of cases named as defendants not only Johns-Manville but a number of other asbestos producers and dealers as co-defendants. Shortly after Johns-Manville filed its Chapter 11 petition, these co-defendants, charged in the complaints of the plaintiffs in the actions as joint tort feasors, sought judicial relief in the bankruptcy court, "inviting," that court by way of a declaratory judgment in the exercise of "its equitable powers" to enlarge the automatic stay provided by section 362 of the Act to include

nondebtor defendants "under the penumbra of section 362's protection" as well as under section 105, and to extend this stay throughout the nation to all asbestos litigation. *Matter of Johns-Manville Corp.*, 26 B.R. 405 (S.D.N.Y. 1983). The primary issue at this stage was stated to be "whether this Court should take the unprecedented step of exercising its discretion pursuant to section 105 of the Code to extend the section 362 automatic stay so as to encompass the co-defendants herein." 26 B.R. at 408-409. The bankruptcy court ruled, first, "that section 362 is limited in scope to the debtor and does not operate to stay actions against the co-defendants of this debtor." 26 B.R. at 409-414. Secondly, it held that relief under section 105 is only available if found to be "necessary or appropriate in order to achieve the goals of a Chapter 11 reorganization," and, even then, only after a finding that "a failure to enjoin would affect the bankruptcy estate and would adversely or detrimentally influence and pressure the debtor through that third-party," thereby justifying a finding of irreparable injury and likelihood of prevailing on the merits. None of these facts the court found present on the instant showing, but it added:

> In an appropriate case, where the proposed extension of the stay is designed to cover actions against entities that truly are inextricably interwoven with the debtor or which affect property of the debtor's estate, section 105 may be used. *In the instant case, such is not the situation as any liability of these co-defendants is not directly attributable to the debtor as it would be if these co-defendants were, for example, key employees of the debtor*. 26 B.R. at 418 (italics in text).

It concluded by declaring that there was "no basis [as shown by the record] to extend the section 362 stay to cover them [the appeals] by means of section 105."

A second action was begun shortly afterwards, this time by the debtor, to enjoin (1) the prosecution of "proceedings against Manville's employees, agents and others" and of discovery proceedings involving them in actions covering "the same issues and subject-matter as are involved in the stayed litigations against

Manville," (2) " 'direct action' lawsuits against insurers and sureties of the debtor"[12] since the coverage of such policies of insurance or suretyship "represent[ed] property of [the debtor's] estate which must be preserved for the benefit of all creditors," and (3) a suit brought by certain security holders against "various of the 'employees, agents and others' " in the district court of Colorado. *In re Johns-Manville Corp.*, 26 B.R. 420, 423 (S.D.N.Y.1983). It will be observed that this proceeding involved matters not litigated in the earlier proceeding; in fact, it involved actions against the debtor's employees for actions attributable to Manville, precisely the point which the court in the earlier case had said was not before it at that time. The bankruptcy court granted a temporary injunction against the continuance of either the suits or of discovery against present or future officers, employees and agents but refused a stay for past officers and employees. In reaching that conclusion it found that "in great measure the suits being pursued against Manville's officers and employees are in reality derivative of identical claims brought against Manville," which, if sustained against the officers and employees, would expose the estate "to claims for contribution and indemnification" and might result in collateral estoppel against the debtor "in subsequent actions." 26 B.R. at 426. It accordingly held it proper to stay these actions and discovery "against [such] non-debtors which would frustrate the statutory scheme or impact adversely on a debtor's ability to formulate a plan or on the debtor's property." 26 B.R. at 427. It further granted the injunction against the security action, finding "that [such] suit is nothing more than an effort to circumvent section 362 by suing Manville's officers and directors when the real party in interest is Manville. In all but formal detail, the [security] litigation is against the debtor within the meaning of section 362." 26 B.R. at 428. It, also, said that:

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12. "Direct actions" against insurers are described in *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 546-47 (5th Cir.1983), and were recognized in *Lumbermen's Mutual Casualty Co. v. Elbert*, 348 U.S. 48, 50, 75 S.Ct. 151, 153, 99 L.Ed. 59 (1964).

> An adverse judgment in the [security] case would have serious consequences for the debtor's estate. Manville's By-Laws require it to indemnify its officers and directors for their litigation expenses, including any amounts paid to satisfy a judgment of liability, so long as the conduct at issue was intended to benefit the company . . . Although Manville believes that the insurance policies which it had in force cover these expenses, the insurance company has reserved its right to contest coverage and to terminate on 30 days notice the payment of defense costs. If the insurance company fails to live up to its obligations, the officers and directors would look to the Company for reimbursement pursuant to the By-Laws. In any event, the policies have specific dollar limits beyond which Manville itself must pay. To the extent expenditures related to the (security) suit exhaust those limits, an asset of the estate is diminished and Manville's exposure in other litigations increases. 26 B.R. at 429.

But it denied a stay of the suits against the insurers and sureties, saying:

> Unlike suits against the debtor's employees and agents, Manville maintains no obligation to indemnify or pay for the defense costs of its insurers or sureties. Thus, the liability of these insurers and sureties in no way inures to the detriment of the Manville estate. 26 B.R. at 431.

On motion for rehearing, however, the bankruptcy court withdrew its decision denying an injunction against suits directed against the debtor's insurers and granted such injunction. It did so on the basis of these findings:

> The debtor "could be adversely affected by the continuation of such suits" since the "insurance policies and proceeds thereof and the causes of action previously asserted by Manville against its insurance carriers in suits pending in California ("California Insurance Litigation") and elsewhere constitute a substantial property of the Manville estate which will be diminished if and to the extent that third party

> direct actions against the insurance carriers result in plaintiffs' judgments" and since "important issues respecting policy coverage and liability may be pressed as collaterally estopping Manville." 26 B.R. at 435. Further, "[t]o permit the third party actions to continue against Manville's insurance carriers will result in a multiplicity of positions and defenses on the part of the insurance carriers and will most likely result in inconsistent decisions and rulings concerning the coverage and liability of the insurance carriers to the third party claimants and to Manville. Such a disorganized and fragmented procedure for resolving such major issues will undermine Manville's attempt at reorganization." 26 B.R. at 436.

It ended with these legal conclusions:

> 1. "Manville's rights under its insurance policies and all the causes of action arising thereunder constitute property of the Manville estates within the purview of section 541(a) of the Code." 26 B.R. at 436.
>
> 2. "Pursuant to § 105(a), the Bankruptcy Court may extend the automatic stay under § 362 of the Code to stay and enjoin proceedings or acts against non-debtors where such actions would interfere with, deplete or adversely affect property of Manville's estates or which would frustrate the statutory scheme of Chapter 11 or diminish Manville's ability to formulate a plan of reorganization." 26 B.R. at 436.
>
> 3. Pursuant to § 362(a) of the Code, all actions "to obtain possession of or interfere with property from Manville estates" are stayed and enjoined. 26. B.R. 436.

As a result of action in the Fifth Circuit to which we later advert and in order to enlarge the stay theretofore granted to include *past* officers and employees, (the court having reached the decision that suits against past as well as present employees of the debtor should be stayed) the bankruptcy court in New York entered a third reported decision in 33 B.R. 254 (S.D.N.Y. 1983). It found that:

> In the event of a recovery against the past or present officers, directors or employees of Manville in any of the pending 1,000 cases, Manville's insurers may be called upon to indemnify such officers, directors and employees under the provisions of the policies issued by them to Manville. If such insurers are called upon to make such indemnification payments, those payments may cause an asset of the Manville estates to be diminished. 33 B.R. at 261.

It reiterated in this same decision its ruling that the insurance policies constituted assets of the debtor, and stated the test for granting a stay or injunction in the circumstances: "(a) possible irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." It concluded by granting the stay in favor of the insurers and the past as well as present directors, officers and employees, finding that the required findings for a preliminary injunction had been satisfied. 33 B.R. at 262-63.

On appeal of certain of these decisions, the district court affirmed the decisions of the Bankruptcy Court staying discovery of any officers, directors or employees of the debtor and ruled that the provisions of section 362 stayed proceedings against the debtor's insurers. Specifically, it declared that "the fact that it [Manville] ultimately may not receive all of the proceeds under its products liability insurance does not affect its status as property under the Code subject to the provisions of the automatic stay." 40 B.R. at 230.

At the same time that these Johns-Manville cases were proceeding in New York, similar issues were arising in asbestos cases filed against Johns-Manville, other joint tortfeasors, and their insurers in the three districts of Louisiana. The three district courts had ruled differently on the right to a stay of all co-defendants of Manville, there being no dispute that the stay was proper of Manville itself. On appeal, the Court of Appeals held in *Wedgeworth v. Fibreboard*, 706 F.2d 541 (5th Cir. 1983), that the automatic stay applied only to Manville, not to the other

defendants and that the showing as made was insufficient to sustain a stay in favor of the co-defendants under equitable principles; however, it sustained the right of the plaintiffs to amend their complaints to state a "direct action" under the Louisiana statute against Manville's insurer and held that such an action was not stayed by any provision of the Bankruptcy Act. After a petition for rehearing, however, the Court modified its decision on the plaintiffs' motion to amend and held "that the district court did not abuse its discretion in declining to permit the plaintiffs to amend their complaints to add, as party defendants, the liability insurance carriers of Johns-Manville and Unarco." 706 F.2d at 548. Two days after this decision was filed, the bankruptcy court modified its previous orders by staying "any and all suits against any past, present or future Manville officer, director or employee or against [his or her] insurers." It added in this order, also, that its prior order would be amended to preclude discovery of the parties against whom suits were proscribed. In an appeal based on a petition for certiorari and for a writ of prohibition against a contempt order against plaintiffs' counsel for violating such stay, the orders of the bankruptcy court were in effect sustained in *In Re Davis*, 730 F.2d 176 (5th Cir.1984).

(g)

As we have earlier indicated, we have discussed at some length these proceedings in the Johns-Manville proceedings in New York and Louisiana, because, with their striking similarity both factually and on the legal issues to this case, the decisions of those courts provide persuasive guidance for our action herein. Though the district judge below did not cite the various rulings of the Manville courts in support of his decision, there was a close identity of issues between those in the *Manville* cases and in the present case. In the three situations in which the defendants have challenged the injunction granted by the district judge [i.e., the Mosa, Conrad and Piccinin cases], the only defendants other than the debtor, are the two Robins, Dr. Frederick A. Clark, Jr., Dr. Hugh J. Davis, and the debtor's insurer Aetna. So far as the suits against the two Robins and Dr. Clark, those defendants were entitled to indemnification by the

debtor under the corporate by-laws and the statutes of Virginia, the State of debtor's incorporation,[13] and were, in addition, additional insureds under the debtor's insurance policy. Dr. Davis was the beneficiary of an express contract of indemnification on the part of Robins and was, under a compromise agreement with Robins and Aetna, an additional insured under Robins' insurance policy. The Manville court had granted a preliminary injunction in favor of defendants in the same position as these defendants, as we have seen, on facts similar to those here, finding that the requirements of possible irreparable harm "had been satisfied by the showing ... [that the suits against the defendants would represent] an immediate and irreparable impact on the pool of insurance assets, of the existence of sufficiently serious questions going to the merits," and of the tipping in the defendants' favor in the hardships in a balancing of the debtor's and the plaintiffs'. 33 B.R. at 262-63. That court had previously disposed of the public interest being weighted in the debtor's favor. "Indeed, this Court finds the goal of removing all obstacles to plan formulation eminently praiseworthy and supports every lawful effort to foster this goal while protecting the due process rights of all constituencies." 26 B.R. at 428.

II.

The district court in this case applied the test for a grant of preliminary injunctive relief as stated by us in *Blackwelder Furniture*, 550 F.2d 189, 195 (4th Cir.1977), and *Televest v. Bradshaw*, 618 F.2d 1029, 1032 (4th Cir.1980). It found, as had

13. It is the accepted practice for corporations such as the debtor to indemnify their directors, officers and employees for the costs of their defense for any judgment rendered against them in such cases. *See A.D.M. Corp. v. Thorison*, 707 F.2d 25, 28 (1st Cir.1983); 13 Fletcher, *Cyclopedia of the Law of Corporations*, § 6045.1 and 6045.3 (1980 ed.). Virginia, the State of the debtor's incorporation, has by statute empowered corporations of that State, by their charter, to provide for such indemnity. Section 13.1-3, 1 Virginia Code; Fletcher, *supra*, section 6045.-2-235. The charter of the debtor, included in the record, provides such right of indemnification for the directors, officers and employees of the debtor in the broadest sense. As we have seen, a stay in favor of such officers, directors and employees, protected as they are by the right to indemnity from the debtor, and the record in this case shows undisputably that these directors and employees are so protected, was in order.

the Johns-Manville courts, that irreparable harm would be suffered by the debtor and by the defendants since any of these suits against these co-defendants, if successful, would reduce and diminish the insurance fund or pool represented in Aetna's policy in favor of Robins, and thereby affect the property of the debtor to the detriment of the debtor's creditors as a whole. The likelihood of success by the debtor under these circumstances appeared indisputable. The hardships which would be suffered irreparably by the debtor and by its creditors generally in permitting these plaintiffs to secure as it were a preference in the distribution of the insurance pool, herein to which all creditors were entitled, together with the unquestioned public interest in promoting a viable reorganization of the debtor can be said to outweigh any contrary hardship to the plaintiffs. Such was the finding in the *Manville* cases and that finding does not appear unreasonable here.

The appellants, however, suggest that the record is insufficient to support such findings by the district judge. We disagree. The record is not extensive but it includes every fact considered by the courts in the *Manville* cases to be necessary for their decision. The rights of Dr. Davis, Dr. Clark and the two Robins to indemnity and their status as additional insureds under Robins' insurance policy are undisputed on the record. That there are thousands of Dalkon Shield actions and claims pending is a fact established in the record and the limited fund available under Robins' insurance policy is recognized in the record. It seems incontestable that, if the suits are permitted to continue and discovery allowed, any effort at reorganization of the debtor will be frustrated, if not permanently thwarted. It is obvious from the record that if suits are permitted to proceed against indemnitees on claims on which the indemnitees are entitled to indemnity by Robins, either a binding judgment against the debtor will result or, as the court in *Metal Center* said, inconsistent judgments will result, calling for the exercise of the court's equitable powers. In our opinion, the record was thus more than adequate to support the district court's grant of injunctive relief. Certainly, the district court did not commit an abuse of discretion in granting the injunction herein.

The appellants add a final complaining note that the district judge state in his decision that the "Conclusions of Law" made by him should apply "with equal force to all defendants similarly situated who are brought to the attention of the court." This is little different, however, from the language of the court in the *Manville* cases in which there was a broad, general injunction against all present or future suits.

In summary, we have no difficulty in sustaining the grant of a preliminary injunction herein. We are sustained in this conclusion by the fact, recognized by the district judge on the record, that any Dalkon Shield plaintiff may at any time petition for the vacation of the stay as it affects his or her suit and he or she is entitled to a hearing on such petition. Actually, there is one such petition pending and the district judge has agreed to set a hearing on that petition.

III

The second appeal questions the validity of the district court's order of November 9, 1985, fixing the venue for the trial of all Dalkon Shield cases and providing for the transfer of such cases to the District Court of the Eastern District of Virginia at Richmond. Robins has challenged the appealability of such order. We find the challenge without merit.

It is unquestionably true that, as the Court in *In Re Amatex Corp.*, 755 F.2d 1034, 1038-39 (3rd Cir. 1985), declared, jurisdiction in a Court of Appeals to review a decision or order of a district court sitting in bankruptcy is controlled by § 1291, 28 U.S.C. *See also Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1114-16 (7th Cir. 1984). While section 1291 limits jurisdiction to appeals from "all final decisions of the district courts," the concept of finality under such statute has traditionally been applied "in a more pragmatic and less technical way in bankruptcy cases than in other situations." *Amatex, supra*, at 1039. Judge Breyer in *In Re Saco Local Development Corp.*, 711 F.2d 441, 443-45 (1st Cir. 1983) has traced this traditional rule of more liberal construction of finality as applied to appeals in bankruptcy cases over

the years. In tracing appealability under the statute in bankruptcy cases, Judge Breyer noted the definition of a "proceeding" in bankruptcy as stated in *Taylor v. Voss*, 271 U.S. 176, 181, 46 S.Ct. 461, 463-64, 70 L.Ed. 889 (1926), as "not the overall liquidation or reorganization, but rather an individual 'matter[ ] of an administrative character . . . presented in the *ordinary course* of the administration of the bankrupt's estate." (Emphasis added by Judge Breyer). He then declared on the basis of this determination that "any dispute between a bankrupt and his creditors over a claim or priority was a separate 'proceeding' and an order settling such dispute was appealable." 711 F.2d at 445. Such is but another practical expression of the principle that "finality" under 1291 is to be given not an absolute and inflexible construction in bankruptcy cases in which a "functional" and "practical" application is to be the rule.

The special or unique reason for this relaxed rule of appealability in bankruptcy is that

> [b]ankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory. *In Re Amatex, supra*, at 1039.

This particular appeal illustrates well the justification for the relaxed rule of appealability in bankruptcy cases. Should appeal be denied and trials proceed in the district court of the myriad of claims involved with the possibility of reversal on appeal from a final decision in such proceedings, months and months of litigation, carried on at great expense to all concerned might be voided and the reorganization derailed, with consequent extensive delays both in reorganization and in resolution of the claims of the tort plaintiffs themselves. Weighty considerations of fairness and efficient judicial administration, therefore, mandate appealability in this case. We accordingly dismiss Robins' challenge to the appealability of the order in question.

Were it necessary, appealability could be sustained under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949), as well as in mandamus. *See In re Ralson Purina Co.*, 726 F.2d 1002, 1005 (4th Cir.1984). We, however, prefer to ground our decision on the more relaxed standard of finality for appeal purposes under 1291 traditionally assigned bankruptcy appeals.

Turning to the merits of the appeal on this part of the case, we address first the power of the district court, sitting in bankruptcy, to enter an order fixing the venue for the trial of tort personal injury claims against the debtor and for transferring all such cases to the bankruptcy court for trial and disposition. Section 157(b)(5) 28 U.S.C. states:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankrupcy case is pending.

We do not understand the appellants to contend that under this language the district court did not have authority under this statute to issue an order fixing the venue for trial of tort cases against a Chapter 11 debtor. They do argue, however, that the sense of the section, if not its precise language, was to decentralize the trial of these tort claims and to permit their continuance for trial in the court in which the complaints were filed and that the ruling of the district judge in this case fixing venue in the district court in which the bankruptcy petition was filed flies in the face of this congressional purpose. They refer to the language of Senator Dole in commenting on the Senate Conference Report on the 1984 amendments and construe it as suggesting that tort claims were to be tried in the court in which those claims were originally filed. Senator Dole, in the language to which appellants refer and out of which the appellants arrive at their finding of the sense of the Congress, actually restated simply the language of the statute itself. He said that "where abstention does

not occur,[14] those cases [i.e., "personal injury cases"] will be handled by the district court where the bankruptcy has been filed or, if that court finds it appropriate, where the claim arose." Statement by Hon. Robert Dole 130 Cong.Rec. S 8889 (daily ed. June 29, 1984), *reprinted in*, 1984 U.S. Code Cong. & Ad.News 586, 587. We discern nothing in that language to warrant the conclusion that, in enacting the statute the Congress favored decentralizing the administration of the bankruptcy by leaving all "personal injury cases" to the court in the place where the claim "arose." In fact, to accept the view of the appellants on the construction of the statute would be completely at variance with the House version of the bill, which was in effect accepted by the Conference Committee, and would be to adopt the Senate version, which, according to Congressman Kastenmeier's statement as a House Conference member, was "largely reject[ed]" by the Conference Committee and "would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case."[15]

Nor do we find anything in *In re White Motor Credit*, 761 F.2d 270, 273-74 (6th Cir.1985), also relied on by the appellants, that lends support to appellant's construction of § 157(b)(5). The extent of the holding in *White Motor* was that the district court had the power under the statute to allow products liability cases to be tried where the claim arose; there was nothing in the opinion, however, that declared that such action was mandated or even preferred. Specifically, there was no statement in the opinion that the district court in which the bankruptcy was pending could not try the claim. Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases.

The primary point of difference between the parties, however, relates not so much to the power of the district court in this

14. "Mandatory abstention under section 1334(c)(2) is not applicable to personal injury claims, but the district court may abstain as a matter of discretion and lift the stay of the state court action." Taggart, *The New Bankruptcy Court System*, 59 America Bank.L.J. 231, 253 (1985).

15. Statement by the Hon. Robert Kastenmeier, 130 Cong.Rec. H.7492, *reprinted in* 1984 U.S. Code Cong. & Adm.News at 579.

case to fix venue for all the pending Dalkon Shield tort cases—that power is stated in unmistakable terms in section 157(b)(5)—but to the manner in which that power may be exercised. Concededly, section157(b)(5) does not prescribe any procedure. The appellants suggest that the procedure to be followed is laid out in 28 U.S.C. § 1412, which provides that "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." As the appellants correctly construe section 1412, the authority to transfer a suit under the statute rests solely with the court in which the suit is pending and it provides no authority whatsoever to a district court sitting in bankruptcy in one district and having jurisdiction of the bankruptcy to transfer the venue of a case against the bankrupt to another district. Section 157(b)(5), however, expressly confers on the district court sitting in bankruptcy and having jurisdiction of the bankruptcy proceedings the power to fix the venue of any tort case against the debtor pending in other districts. The purpose of this latter statute was, as Congressman Kastenmeier declared, to centralize the administration of the estate and to eliminate the "multiplicity of forums for the adjudication of parts of a bankruptcy case." 130 Cong.Rec. H 7492, June 29, 1984, *reprinted in* 1984 U.S.Code Cong. & Adm.News at 579. That purpose would be thwarted and the plain language of section 157(b)(5) nullified if the power of the district court sitting in bankruptcy to fix the venue for tort claims against a debtor was to be preempted by the provisions of section 1412. We do not believe this to have been the intention of Congress in enacting the two statutes. Section 157(b)(5) was drafted to cover the procedure in connection with a special group of cases, to wit, personal injury tort claims against a debtor in Chapter 11 proceedings wherever pending and in that connection the section is supreme. In all other cases related to the bankruptcy proceedings, however, the general statute (*i.e.*, section 1412) would govern. This, we think, is the proper construction to be given the two statutes. It is a construction which harmonizes the two sections. It conforms to that established canon of statutory construction that "[w]e must read the statutes [in those instances where there is any possible conflict] to give effect to each if we

can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2nd 80 (1981); *Columbia Gas v. Federal Energy Regulatory Comm.*, 651 F.2d 1146, 1158 (5th Cir.1981); *Pennsylvania v. Dept. of Health & Human Resources*, 723 F.2d 1114, 1119 (3rd Cir.1983). To accept the appellants' interpretation and to negate the plain language of § 157(b)(5) "would violate the basic principle of construction that statutes should be read, if possible, as harmonious texts." *Leaf Tobacco Exporters Assn. v. Block*, 749 F.2d 1106, 1115 (4th Cir. 1984). We, therefore, have no difficulty in finding that the district judge's authority to fix venue of personal injury tort actions against the debtor exists under § 157(b)(5), irrespective of the district in which such controversy is pending.

And there are very real considerations that support a centralization of all the Dalkon Shield claims, *at least at first*, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims. *See In re Towner v. Petroleum Co.*, 48 B.R. 182, 190 (W.D. Okla.1985). These Dalkon Shield claims, asserted by thousands of individuals in courts throughout the United States on behalf of both citizens of this country and citizens or residents of other countries, represent what are characterized in the Act as "contingent or unliquidated claims." 11 U.S.C. § 502. Ordinarily such claims would be "estimated" by the bankruptcy court as a "core proceeding," 28 U.S.C. § 157(b)(2), for purpose of allowance if failure to do so "would unduly delay the administration of the case." 11 U.S.C. § 502(c); 3 Collier on *Bankruptcy*, § 502-03 (15 ed. 1982). That duty of estimation in a proper case under section 502(c) is not a permissive one; it is a mandatory obligation of the bankruptcy court. *In re Nova Real Estate Inv. Trust*, 23 B.R. 62 (E.D.Va.1982). This customary process of estimation of contingent claims is, however, different where the unliquidated contingent claims are personal injury tort claims.

Section 157(b)(2)(B) excepts from the definition of "core proceedings" personal tort claims against the debtor. The bankruptcy court thus is without authority under the Act over "the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of *distribution* under Title 11" 28 U.S.C. § 157(b)(2)(B). (Italics added) It will be observed, however, that the statute denies authority to the bankruptcy court to "estimate" contingent claims only if the purpose is to make a "distribution" of the assets of the debtor; the statute does not in express terms deny to the bankruptcy court the authority, or relieve it of the duty, to "estimate" the contingent "personal injury" claims for purposes of determining the feasibility of a reorganization. And such has been the construction of the statute which has been adopted by the courts which have had to face the issue, the two leading cases being proceedings arising out of the asbestos litigation. *Roberts v. Johns-Manville Corp.*, 45 B.R. 823, 825-26 (S.D.N.Y.1984); *In re UNR Industries, Inc.*, 45 B.R. 322, 326-27 (N.D.Ill.1984). Both of these cases hold that estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's jurisdiction, and that such estimations are not foreclosed by Section 157(b)(5) of the Act.[16]

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16. *Roberts* at 826 said:

Even assuming that section 157(b)(5) requires that all personal injury and wrongful death claims be tried in the district courts, the Court does not find that immediate withdrawal and liquidation of Roberts' claim is appropriate. Section 157(b)(2)(B) does not exclude from the definition of core proceedings estimations of personal injury and wrongful death claims for all purposes. The section is limited to estimation "for purposes of distribution." This leaves estimation for other purposes within the jurisdiction of the bankruptcy court. *See In re UNR Industries*, 45 B.R. 322 (N.D.Ill.1984). A trial is not needed, therefore, to satisfy the requirement of section 502(c) that "all claims against the debtor be converted into dollar amounts." (citing Congressional sources). Thus, even if the Code and the 1984 Act require that each and every asbestos claim filed in this eventually be tried, they do not require immediate withdrawal of those claims before a reorganization plan has been confirmed.

This is not to say the personal injury claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim in the district court. Section 157(b)(5) gives them that right. But, even though the tort claimants may be entitled to their jury trials, the bankruptcy court is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims. The real question thus arises as to which proceedings takes precedence, whether the estimation by the bankruptcy court of the claims or the jury trials in the district court of the claims. The authorities which have considered this question in connection with a complicated products liability situation such as this are all unanimous. The estimations of the potential and pending claims by the bankruptcy courts should precede any trials of the claims. This was specifically held in the asbestos cases. *Roberts v. Johns-Manville Corp.*, 45 B.R. at 825-26. After all, the first and primary purpose of the proceedings, however, is to ascertain whether a fair reorganization of the debtor can be achieved. This purpose may well be completely thwarted if the energies of the debtor's executives and officers are initially diverted by, and the resources of the debtor are dissipated in the expenses of litigating, the trial of thousands of personal injury suits in courts throughout the land spread over an interminable period of time. As the Court in *Newton v. Johns-Manville Corp.*, 45 B.R. 827, 830 (S.D.N.Y.1984), put it, in explaining its decision to proceed in the estimation of the claims before setting any claim for trial: there is no "sense in ordering a trial of a [tort claimant's] claim against Manville until a plan has been developed for Manville and until there is reason to believe that the time and expense of potentially 25,000 personal injury trials of the claims against Manville will not deplete the estate and leave other creditors with empty judgments."

There are 5,000 suits pending against the debtor in this proceeding. There are perhaps an equal number not filed. If all these claims were to be tried, the expense of discovery proceedings and trial would likely consume all the assets of the debtor and exhaust all the resources of its executives and employees. As one court has commented, we "must be mindful of the realities of modern litigation. Pre-trial discovery under modern federal

practice has become a monster on the loose . . . Pre-trial proceedings have become more costly and important than trials themselves." *In re Johns-Manville, supra*, 40 B.R. at 224. Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.[17] In addition, the real purpose of the proceeding (*i.e.*, a reorganization of the debtor and its continuance as a going business) could be attained.

It is manifest, of course, that the process of estimation will involve some examination of the claims. But this examination will be conducted by the court, will likely not involve duplicative discovery, and can be accomplished expeditiously. It was argued in *In re UNR Industries, Inc.*, 45 B.R. 322 (N.D.Ill.1984), though, that this would require a hearing by the bankruptcy court in making its estimation of the tort claims and accordingly would "not be any more efficient than ordering district court trials." The court dismissed the argument with this apt comment:

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17. Section 157(b)(5) "does not mandate that all tort actions must be tried in district court, but only those which are not settled otherwise . . . ." Bankruptcy Service, L.Ed. § 2:14:5, at 22 (Supp. 1985) (summarizing *Roberts v. Johns-Manville, supra*, 45 B.R. at 825-26), and "the parties are certainly free to agree to a dispute-resolution procedure that does not involve trial," *UNR, supra*. 45 B.R. at 326. To the same effect is *Newton v. Johns-Manville Corp.*, 45 B.R. 827, 830 (S.D.N.Y. 1984).

> This contention both understates the time and expense of trials and overstates the time and expense of the estimation process. Even should Judge Toles decide the Towers study is insufficient to accurately estimate asbestos claims and that some sort of hearing is necessary, there is no reason to believe 17,000 hearings must be held to get an accurate enough picture of the debtor's liability to asbestos victims. 45 B.R. at 326.

That language is applicable in this case. It is unlikely that all 8,000 to 10,000 claims which have been filed would have to be tried before an intelligent estimation of the claims could be made by the bankruptcy court. The interests of all the claimants and the public interest in a reasonable and fair reorganization combine in favor of an effort at an estimation of the Dalkon Shield claims as a basis for formulating such a plan of reorganization and as a possible step in working out a mechanism acceptable to all the claimants for a dispute-resolution of their claims without burdening the estate with the tremendous expense of endless litigation and reducing if not exhausting, the assets available for paying those claims.

No progress along estimating these contingent claims, however, can be made until all Dalkon Shield claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized. *Cf. Fidelity Mortgage Investors v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir.1976), *cert, denied*, 429 U.S. 1093, 97 S.Ct. 1670, 52 L.Ed.2d 372. That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

However persuasive may be the reasons for fixing temporarily at least venue of all the pending suits against the debtor in the district court sitting in bankruptcy where all the other

Dalkon Shield claims not in suit may be handled together, the question remains as to what procedure must be followed in effecting such change of venue in order to satisfy the requirements of due process. It is the position of the appellants that a right of action in tort is "property" which may not under due process be adversely affected by an involuntary change of venue in the absence of a full hearing after reasonable notice. It may be accepted that, as the appellants argue, a tort claim or action is a "species of property" in the constitutional sense. *Logan v. Timmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153-54, 71 L.Ed.2d 265 (1982); *cf. Martinez v. California*, 444 U.S. 277, 281-82, 100 S.Ct. 553, 557, 62 L.Ed.2d 481 (1980). Similarly, it may be agreed that where the plaintiff has such a claim against a debtor in a Chapter 11 proceeding, he has a statutory right to a jury trial in a district court and that the place of such trial is an important right which may be entitled to some form of due process protection under the broad principles of *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). The question is, though, what form such protection must take.

"Due process" does not establish an inflexible standard to be rigorously applied in all cases. Recently, in *McClelland v. Massinga*, 786 F.2d 1205 (4th Cir. 1986), we said that "due process is not 'a technical conception' of 'inflexible procedures' (citing *Cafeteria Workers v. McElroy*, 367 U.S 886, 895, 81 S.Ct. 1743, 1748-49, 6 L.Ed.2d 1230 (1961) nor is it 'a mechanical instrument' or 'yardstick'; it is rather 'a delicate process of adjustment' and of a balancing of interests in which it is recognized 'that what is unfair in one situation may be fair in another . . . .' " In particular, it is important to recognize that the notice and hearing is not "*always* require[d] . . . prior to the initial deprivation of property" and that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportuntiy given for ultimate judicial determination of liability is adequate." *Parratt v. Taylor*, 451 U.S. 527, 540, 101 S.Ct. 1908, 1915, 68 L.Ed.2d 420 (1981). We conclude therefore, that due process requires some form of notice and opportunity for a hearing before there can be

a change of venue and before trial of a personal injury tort cause of action against a debtor may be transferred *finally* from the court in which the cause was initially filed to the district where the bankruptcy proceedings are pending.

We reach this conclusion not only under due process analysis, but also under the language and Rules issued under the Bankruptcy Act. In our opinion, the debtor's motion herein qualified as a "contested matter" under the Act. As such it had to be begun by the filing of a motion with "reasonable notice and opportunity for hearing. . . . afforded the party against whom [the] the relief [was] sought." Bankruptcy Rule 9014. The debtor filed with the district court sitting in bankruptcy an appropriate motion for a fixing of venue and for transfer of tort claims against the debtor, and notice in the manner provided by the Rules in this case was given but only to the Committee of Representatives of Dalkon Shield claimants. There was no notice given the individual Dalkon Shield claimants who had causes of action against the debtor pending in court. Counsel for the debtor asserted in argument in district court in justification of failure to serve the individual plaintiffs in the tort actions that "in these cases the tradtional rule is that you serve the counsel for the Committee, and the Committee, the counsel then has the obligation to bring such matters as are appropriate to the attention of the members of the Committee," Counsel cited no authority for this "traditional rule." The Committee, however contends that notice to it was not notice to the indiviual claimants and that such notice did not satisfy the notice requirements of Bankruptcy Rule 9014 or of due process.

The role of Committees appointed under the Act as revised has received considerable discussion but remains somewhat uncertain. As we have already noted, the status and position of Chapter 11 Committees are thoroughly canvassed in Andrews, *The Chapter 11 Creditors' Committee: Statutory Watchdog?*, 2 Bankruptcy Developments Journal, 247 (1985). As that article indicates, the Committee's right to intervene and be heard in any proceeding is, we think, fairly established. *Matter of Marin Motor Oil, Inc.*, 689 F.2d 445, 454-6 (3d Cir.), *cert. denied*, 459 U.S. 1206, 103 S.Ct. 1196, 75 L.Ed.2d 440 (1983). In fact, the

Rules require that certain notices in the course of the proceedings must be given the Committee. But it seems clear under the Rules that the Committee is not authorized to represent the individual interests of any claimant, as distinguished from the general interests of all claimants, *In re Johns-Manville*, 26 B.R. 919, 926 (S.D.N.Y. 1983), and only in certain specific situations, no one of which is relevant here, may proper service be made on the Committee rather than on the individual claimants themselves under Bankruptcy Rule 2002(i). It follows that, in our opinion, service of notice of the hearing on the motion to fix venue and to transfer, as given only to the Committee did not represent compliance with Bankruptcy Rule 9014 or with due process.

Conceding that notice to the Committee did not qualify as service on the individual claimants, it does not follow that the absence of such notice may be fatal to due process in this proceeding. The notice to the Committee may have been sufficient under *Cleveland Bd. of Education v. Loudermill*, ____ U.S. ____, ____, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494, 506 (1984) to permit the issuance of a provisional or conditional order providing for a fixing of venue in the district court sitting in bankruptcy for all the pending Dalkon Shield cases against the debtor *but giving the claimants individual notice and an opportunity to object and to be heard before the order became final in any case where the plaintiff has filed an objection*. That procedure would satisfy due process under *Parratt* and the other cases. And, as we read the record as well as the formal order of the district court, this is precisely what the district court intended, though the language of its order may be obscure on the point.

The district court entered a ruling bringing for the time being all the pending suits against the debtor before the district court sitting in bankruptcy in order to proceed expeditiously in the reorganization but with the definite condition that any party might object and might petition for abstention in his or her case. It was in our opinion intended as a conditional order, though not clearly stated as such. We are of the opinion, because of this possible want of clarity in the order assailed, that such order must be modified to make it crystal clear that the determination

of venue therein is, as we have said, conditional, dependent finally and ultimately on a ruling to be made only after notice to all claimants advising them of their right to enter any objections they may have to such a tentative ruling and to submit a motion for abstention in their particular case.[18] The notice to be given all claimants could be in the form of a letter both to the claimant and to his or her attorney stating the conditional ruling made subject to a final hearing, to become final only after reasonable opportunity given all claimants to object and/or to seek abstention. We would think the notice should fix a time limit for the filing of objections by claimants and should fix a day for a hearing on the objections. The tentative order might be made final as to any claimant who failed to enter an objection within the prescribed time. The mailing of the notice as required will not involve any great expense. Such a modification of the order, followed by a notice in the form suggested, it would seem, should satisfy the requirements of due process and of the Bankruptcy Rules in the unusual circumstances of this case. In order to achieve this modification in the order of the district judge, this phase of the appeal is remanded to the district court for further proceedings in accordance with the opinion herein.

We do not presume to suggest rigid guidelines for the district judge to follow when considering objections to the transfer. We believe it important, however, to observe that although there may be distinct advantages of the tort claims being transferred to Richmond, those advantages should be balanced against disadvantages that may be advanced at the hearing. In that regard, some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted

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18. Until the conditional order is made final with regard to a particular case, a case should not be physically transferred. Thus, no filing fee shall be paid under Rule 9027 or expenditures accompanying photocopying, freight, etc, be made. Only after an order is final shall the expense of transfer be necessary.

or transferred to Richmond. All of these factors are relevant. Moreover, there are issues of state law that may substantially affect the results in individual cases.

In summary, we affirm the district court's order staying the suits of the plaintiffs against the debtor and all co-defendants, but remand with directions the order fixing venue for all pending suits against the debtor and transferring the suits to the district court before which the bankruptcy proceedings were pending.

AFFIRMED IN PART and REMANDED WITH DIRECTIONS.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION NO. 86-0315-R

GLENDA BRELAND, et al

vs.

AETNA CASUALTY & SURETY CO.

INITIAL PRE-TRIAL ORDER

– Deeming it proper so to do, it is ADJUDGED and ORDERED that:

1. Unless already filed, answers to the complaint will be filed within ten (10) days of this date. Any such filing will not be deemed a waiver of any prior motions.

2. Counsel will meet with the Court in chambers at 1:00 P.M., on Wednesday, July 23, 1986, for purposes of setting this case for trial, and, if necessary, the setting of a date for a formal pre-trial conference.

3. All counsel should anticipate a trial date within ninety (90) days of this date except in cases of protracted litigation.

4. All counsel are admonished to expedite discovery.

5. Counsel attending are to be sufficiently knowledgeable of the case to respond to such queries as the Court may deem appropriate, and be prepared to discuss settlement prospects.

Let the Clerk send copies of this order to counsel of record and to *pro se* litigants.

/s/ ROBERT R. MERHIGE, JR.
United States District Judge

Date: July 7, 1986

IN THE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

CIVIL ACTION NO. 85-H-920-N

ANNA PICCININ,

Plaintiff,

vs.

A.H. ROBINS COMPANY, INCORPORATED and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

COMPLAINT

Comes now the plaintiff, ANNA PICCININ, and files this her complaint against the defendants, A.H. ROBINS COMPANY, INCORPORATED and THE AETNA CASUALTY AND SURETY COMPANY, and shows:

COUNT ONE

1.

Anna Piccinin, hereinafter called plaintiff, is a nonresident of the State of Alabama, and is a subject of the United Kingdom of Great Britain and Northern Ireland, having been born in England on October 11, 1946. She presently resides in Rome, Italy.

2.

Defendant A.H. Robins Company, Incorporated, hereinafter defendant Robins, is a corporation organized and having its principal place of business in the State of Virginia. Defendant Robins is a foreign corporation presently doing business within Montgomery County, Alabama, and has at all times material to this litigation regularly and intentionally done and solicited business within said County and State and has derived substantial

revenue from its products, including the Dalkon Shield, which products have been sold and used in said County and State. Defendant Robins may be served by service upon its detailman, Robert Eugene Star, 3444 Dresden, Montgomery, Alabama 36111; and by service upon W.A. Forest, Jr., A.H. Robins Company, Incorporated, 1407 Cummings Drive, Richmond, Virginia 32220, by certified mail.

3.

Defendant The Aetna Casualty and Surety Company, hereinafter defendant Aetna, is a foreign insurance corporation organized and having its principal place of business in the State of Connecticut. Defendant Aetna does business by agent in Montgomery County, Alabama, and has at all times material to this litigation, regularly and intentionally done and solicited business within Montgomery County, Alabama, and has derived substantial premium revenue from within said County and State. Defendant Aetna is qualified to do business in Alabama and has a registered agent upon whom service of process can be perfected, to-wit: Glen R. Terrence, #4 Metroplex Drive, Birmingham, Alabama.

4.

Jurisdiction and venue are proper in this Court pursuant to 28 U.S.C. Sections 1332, 1350 and 1391, in that there is diversity of citizenship between the parties and the amount in controversy exceeds the jurisdictional amount, exclusive of interest and costs, and plaintiff is an alien. Pursuant to Sections 6-3-7 and 6-5-430 of the Code of Alabama, 1975, as amended, this is a proper forum for this action.

5.

While in England in July 1973, plaintiff was prescribed and had installed a Dalkon Shield, a product manufactured, sold and distributed by defendant Robins.

6.

As a direct and proximate result of her use of the Dalkon Shield, plaintiff required hospitalization and surgery and suffered the removal of the fallopian tubes on both sides and removal of her left ovary on August 16, 1979.

7.

The Dalkon Shield is an intrauterine contraceptive device (I.U.D.), which, upon being inserted into and existing in the body of the user, produces a noxious uterine infection, which infection is injurious. The etiology of the infection involves a prolonged latent development.

8.

The multi-filament nylon 6 tail string of the commercially distributed Dalkon Shields was and is defective and unsafe as a long-term foreign body implant within the human body in general or within the uterus in particular. Nylon 6 is not an inert plastic and will degrade and erode while implanted in the uterus and vagina through a process of physical and chemical deterioration.

9.

The Dalkon Shield had a multi-filament tail string capable of, and which did, wick bateria into the uterus, causing infection and bodily injury.

10.

Defendant Robins and defendant Aetna, prior and subsequent to July 1973, had notice, through defendants' own investigations and through extensive claims presented and cases filed, of the dangerous and injurious effects of the Dalkon Shield, had knowledge of the defectiveness of the device as an intrauterine contraceptive device, and had notice and knowledge of medical opinions rendered and based upon a reasonable degree of medical certainty that the Dalkon Shield was defective and was causing serious personal injuries to users of the device.

11.

Defendant Robins, with the knowledge and advice of defendant Aetna as to labeling and warnings, promoted and sold various Dalkon Shield models (its "commercially distributed models") from about January 1, 1971, until approximately June 27, 1974, at which time the Federal Food and Drug Administration (hereinafter referred to as F.D.A.) suspended the sale of the Dalkon Shield on the grounds of safety.

12.

On or about March 16, 1972, defendant Robins and defendant Aetna had actual knowledge that the tail string of each Dalkon Shield model commercially distributed was defective and constituted a health hazard and unreasonable risk to users in that the tail string deteriorates and erodes in the uterus.

13.

Defendant Robins and defendant Aetna had knowledge that commercially distributed Dalkon Shields would reach consumers in an experimental and clinically untested condition.

14.

Plaintiff had no knowledge of any defect in the Dalkon Shield, nor was she aware of any injury to her as a result of the use of the Dalkon Shield until on or about July 25, 1983.

15.

Defendant Aetna was the liability insurance carrier of defendant Robins at the time defendant Robins bought the rights to the Dalkon Shield in 1970, there then being in existence a primary liability policy for the policy period 3/1/68 to 3/1/71 and an excess policy in existence for the same period.

16.

Defendant Aetna, through its underwriting, medical and engineering or technical service sections, after investigation and examination of the Dalkon Shield and review by its medical section, reached a decision that it would insure the Dalkon Shield

and insurance was provided within the aforesaid policies, prior to the marketing of the Dalkon Shield by defendant Robins on or about January 1, 1971.

17.

The aforesaid primary policy was endorsed in 1970 as follows:

> This endorsement modifies such insurance as is afforded by the provisions of the policy relating to the following:
>
> Completed operations and products liability insurance
>
> It is agreed that condition 4 is amended by the substitution of the following for the last sentence in paragraph (A) of said condition:
>
> "The named insured shall promptly take at his own expense all reasonable steps to prevent additional bodily injury or property damage from arising out of the same or similar conditions at the same location where the initial bodily injury or property damage occurred; provided, (1) that a failure to take such preventive measures shall not constitute a breach of this condition unless the company has requested the named insured in writing to undertake such preventive measures, and (2) such expense shall not be recoverable under this policy."

18.

As early as August 1970 and continuing at least through March 1973, defendant Aetna, from its investigations of the Dalkon Shield, made recommendations to defendant Robins with reference to labeling, adverse effects or reactions and precautions, in connection with the marketing of the Dalkon Shield.

19.

Defendants Robins and Aetna reviewed on a yearly basis the liability coverage, both primary and excess, as to products manufactured and sold by the defendant Robins, including the Dalkon Shield, and commencing about 1975, specific policies

were written on the Dalkon Shield only and other products had a separate liability coverage.

20.

Defendant Robins loss retention with respect to the Dalkon Shield liability coverage increased to $250,000.00 for 1971 and 1972, was $750,000.00 in 1973 and 1974 and, in 1975, jumped to a loss retention of $4 million. By 1978 defendant Aetna would provide no more than $5,000.00 total liability coverage for all claims as to the Dalkon Shield nor could defendant Robins otherwise obtain liability coverage for the Dalkon Shield.

21.

After commencing marketing of the Dalkon Shield in January 1971, both defendants received notice of complaints, including higher-than-expected pregnancy rates and pelvic inflammatory disease, reports of septic spontaneous abortions resulting from infection and at least one death associated therewith, all prior to the time that plaintiff was prescribed and had installed a Dalkon Shield in July 1973.

22.

In February 1975, after trial, a verdict was rendered against defendant Robins for compensatory damages and punitive damages in a Dalkon Shield case in Kansas.

23.

Subsequent to the marketing of the Dalkon Shield in January 1971, large numbers of claims were asserted and suits filed alleging bodily injury arising out of the manufacture, labeling, distribution or sale of the Dalkon Shield, many suits containing prayers for punitive or exemplary damages. By February 1975, defendant Robins had at least 148 such cases pending.

24.

Subsequent to the primary policy for the period 3/1/68 through 3/1/71, defendant Aetna, by design and based upon its knowledge of the dangers of the Dalkon Shield, began a course of action with regard to policies of insurance issued by Aetna for Robins in connection with coverage of the Dalkon Shield which

was designed to limit or minimize the exposure of Aetna with regard to future claims made.

25.

Commencing at least in 1976, written agreements were entered into by and between defendant Robins and defendant Aetna. The agreement of March 9, 1977, contained therein the following:

> (5) That Aetna hereby forever waives and relinquishes all of its rights whether accrued or unaccrued, which it does have, or could have, as of the date of this agreement, to deny coverage under the Policies for said cases (with the exception of Aetna's right to deny liability to Robins or others for punitive damages arising out of said cases), particularly on account of, but not limited to, the following:
>
> > (A) The fact that said claims or awards are or may in the future be based upon expected or intended bodily injuries or that they are based upon conduct or events that do not meet the definition of "occurrence" within the meaning of any of the Policies.
> >
> > (B) The breach or potential breach, if any, by Robins as of the date of this agreement of the conditions in the policies relative to cooperation or for failure to disclose important relevant information and the supplying of false or misleading information relative to said cases and other acts directly or indirectly connected therewith.
>
> (6) That Aetna also hereby forever waives and relinquishes any rights, whether accrued or unaccrued, it has or could have as of the date of this Agreement to rescind or revoke the Policies or any of them on account of Robins' failure to disclose relevant information and the supplying of false and misleading information and other acts directly or indirectly connected therewith.
>
> (7) That Robins releases and relinquishes and waives all rights it might have now or in the future to seek from

Aetna sums paid or to be paid in satisfaction of claims or awards for punitive damages as a result of said cases and further agrees that no coverage exists for punitive damages, if any, arising from said cases under the Policies.

26.

Various nonwaiver agreements entered into by and between defendants Robins and Aetna terminated as of December 1, 1984, pursuant to a settlement agreement entered into October 31, 1984, by and between defendants Robins and Aetna.

27.

The aforesaid settlement agreement of October 31, 1984, further provided that certain litigation by and between defendants Robins and Aetna in the Circuit Court of the City of Richmond, Virginia, Division One, including all claims and cross-claims, be dismissed with prejudice.

28.

The primary policy covering the Dalkon Shield issued for the policy period 3/1/77 to 3/1/78, by virtue of the deductible provisions and other provisions and endorsements, in effect converted the policy principally into an administrative services arrangement.

29.

Policy number 53PK13SCA, policy period from 3/1/78 to 3/1/81, evidenced both an administrative services arrangement and a financing arrangement for defendant Robins with the defendant Aetna as the banker, and provided no meaningful insurance coverage, whether issued or unissued.

30.

The primary liability policies for the Dalkon Shield, and in particular the policies covering the period of July 1973 through the balance of the insuring periods, contain a "Policy Territory" definition meaning ". . . anywhere in the world with respect to Damages because of Bodily Injury or Property Damage arising out of a product manufactured within the territory described in paragraph (1) above, provided the original suit for such damages

is brought within such territory; . . . " The territory described in the aforesaid paragraph (1) is " . . . the United States of America, its territories or possessions or Canada . . . "

31.

By agreement between defendants Robins and Aetna, special handling instructions were issued to Aetna field offices for the handling of Dalkon Shield claims, as distinguished from other claims involving defendant Robins, and wherein defense counsel were selected by mutual agreement of said defendants and in some instances being other than normal defense counsel representing defendant Aetna.

32.

Defendant Aetna assumed a duty to conduct post-market surveillance of the Dalkon Shield, such a duty resting initially with and continuing as a matter of law thereafter also as to defendant Robins. Both defendants breached or violated this duty by the failure to exercise ordinary care in the performance of their duty such that the risk of harm to users of the Dalkon Shield was increased.

33.

An outside law firm employed by defendant Robins became, in essence, defendant Robins' claim department in connection with punitive damage aspects of claims and cases against defendant Robins, reviewing claims and cases and making recommendations for the payment of such damages to settle and dispose of claims or cases made by Dalkon Shield users.

34.

Defendant Robins retained an outside law firm that participated along with defendant Aetna in the drafting of instructions to the field agents of defendant Aetna on the handling of post-March 1, 1978 cases.

35.

The agreements entered into by and between defendant Robins and defendant Aetna were of substantial benefit to each

such defendant and changed the relationship between the parties thereto from insured and insurer to a joint enterprise with respect to the handling and payment of claims for injuries, damages or expenses arising out of or resulting from the manufacture, labeling, sale, distribution and use of the Dalkon Shield asserted by such users, including plaintiff herein, and in particular with reference to claims for punitive damages.

36.

Defendant Robins and defendant Aetna, each acting by and through its officers, agents, servants, employees, attorneys or other representatives, combined together and engaged in a course of conduct and acted in concert prior to and subsequent to the initial marketing of the Dalkon Shield, and by virtue of the relationship entered into and concurred in by and between said defendants and the acts and purposes intended and accomplished, are liable to plaintiff as joint tort-feasors for compensatory and punitive damages for unlawfully and negligently testing, manufacturing, labeling, marketing, failing to recall and failing to give warning of the dangers involved in the use by women in general, and plaintiff in particular, of the intrauterine contraceptive device (I.U.D.) known as the Dalkon Shield.

37.

Defendant Robins and defendant Aetna willfully and fraudulently concealed their knowledge of the dangers attendant upon the use of the Dalkon Shield to the benefit of each said defendant and to the detriment, injury and damage of plaintiff.

38.

Defendants Robins and Aetna have engaged in an on-going conspiracy, entered into prior to the time that plaintiff was prescribed a Dalkon Shield and continuing to the present date, such that the acts and conduct of each such conspirator are the acts and conduct of the other, for which either or both are liable to plaintiff. The purpose and effect of the conspiracy was to benefit the defendants and to injure plaintiff, in that by failing to exercise reasonable care in the testing, inspection and post-market surveillance of the Dalkon Shield, by failing to warn the medical

profession, the public in general and plaintiff in particular of the dangers involved in the use of the Dalkon Shield, by failing to recall the Dalkon Shield, by intentionally accumulating records and documents in outside attorneys' or insurance claims offices rather than in Robins' medical or claims departments where full and accurate adverse reactions could be compiled and documented, and which would have required reports to the Food and Drug Administration and led to public notice and recall of the Dalkon Shield prior to the injuries and damages suffered by plaintiff, such defendants thereby increased the risk of physical harm to and caused personal injury to plaintiff. Defendants also by such conduct hindered, delayed and obstructed knowledge of and the presentation of claims and demands against defendants so that statutes of limitation could be urged by that defendant as defenses to claims and suits and such that defendant Aetna could assert that claims were made outside of insurance policy periods of coverage or in which, although claims might be made, payment of compensation would be delayed so that both defendants would have the use of multi-millions of dollars over an extended period of years that would otherwise have been paid to claimants, including this plaintiff, for injuries and damages including medical expenses, suffered as a result of the use of the Dalkon Shield and for expenses incurred in the removal of Dalkon Shields in use and injuries in connection therewith.

39.

Plaintiff says that the acts and conduct of defendants Robins and Aetna were international in scope and caused world wide injuries to users of the Dalkon Shield, including injuries to women residing in Alabama and in this Judical District.

40.

Plaintiff says that she has commenced this action promptly upon discovery of the fraudulent acts and conduct of the defendants herein and that this action is timely filed, and plaintiff further pleads the law of England and says that by virtue of the law of England, as contained in the Limitation Act of 1980 and as contained in the Foreign Limitation Periods Act of 1984, any

period of limitation applicable to her claim is a matter of substantive law and a part of the public policy of England, and under such substantive law and public policy her action filed herein is timely, as would this action be if filed in England.

41.

Plaintiff shows that the course of conduct and the acts of the defendants were so willful, intentional, immoral and fraudulent as to estop and bar the defendants from the right to plead or claim a defense, if any, of a limitation of action, whether in this Court or in England, or whether arising under the laws of this State or of England.

42.

Plaintiff's injuries and damages, including her inability to now conceive and have children, were directly and proximately caused by the negligence of the defendants, and each of them, in one or more of the following respects:

(1) Manufacturing, promoting, labeling and selling an experimental intrauterine device known as the Dalkon Shield without adequate testing;

(2) Using the public, including plaintiff, and the medical profession to test the modified experimental Dalkon Shield without revealing this fact;

(3) Manufacturing, promoting, labeling and selling a defectively designed and manufactured intrauterine device;

(4) Manufacturing, promoting, labeling and selling the Dalkon Shield which utilized a defective and dangerous insertion technique, perforator design, infector and multi-filament tail string capable of wicking bacteria into the uterus;

(5) Over-touting and over-promoting the Dalkon Shield as to efficacy, safety and superiority so as to negate any dangers connected with its use;

(6) Promoting, labeling and selling the modified and experimental Dalkon Shield as superior and medically safe with

knowledge that it was inferior, dangerous and inadequately tested;

(7) Promoting, labeling and selling a misbranded medical device contrary to law;

(8) Using false and misleading advertising and labeling to promote Dalkon Shield sales contrary to law;

(9) Failure to adequately and timely warn the medical profession, the public and this plaintiff of the ineffectiveness, risk of infection, injury and loss of vital organs, defects and other dangers associated with the Dalkon Shield;

(10) Deliberately withholding information from doctors, the public, and this plaintiff in particular, concerning defects, ineffectiveness, reactive copper content and the risk of injury, infection, illness, loss of vital organs, and death arising out of the use of the Dalkon Shield;

(11) Failure to send remedial "Dear Doctor" letters and to use other means to withdraw false and misleading claims of safety, superiority and efficacy;

(12) Deliberately and negligently misrepresenting the Dalkon Shield to the medical profession, to the public and, in turn, to this plaintiff.

(13) Failure to recall the Dalkon Shield, and in particular, failure to recall the Dalkon Shield during the period of time used by this plaintiff.

(14) Violating duties as to post-market surveillance of the Dalkon Shield by failing to exercise ordinary care in connection therewith such that the risk of harm to users of the Dalkon Shield was increased.

COUNT TWO

43.

Plaintiff realleges and incorporates paragraphs 1 through 42 of Count One herein and makes the same a part hereof.

44.

Robins manufactured and sold, as new, the Dalkon Shield, a product which was defective and unreasonably dangerous and harmful to the user of the product.

45.

Robins was at all relevant times in the business of manufacturing and selling the Dalkon Shield.

46.

The Dalkon Shield used by plaintiff did reach plaintiff without substantial change in the condition it was in at the time it was sold.

47.

The product was defective in several particulars, construction, assembly, design, labeling and inadequate warnings which resulted in a failure to warn, as a direct consequence of the acts of the defendants, and these defects singularly and together proximately caused plaintiff's injuries, damage and loss.

48.

The defects above mentioned and incorporated herein by paragraph 43 above did cause plaintiff's injuries while she was using the Dalkon Shield for its ordinary, intended and foreseeable purpose, and in an ordinary, intended and foreseeable manner.

COUNT THREE

49.

Plaintiff realleges and incorporates paragraphs 1 through 42 of Count One and paragraphs 44 through 48 of Count Two herein and makes the same a part hereof.

50.

Plaintiff's injuries and damages, including her inability to now conceive and have children, were directly and proximately caused by the gross and wanton negligence and/or the willful and/or wanton doing one or more of the foregoing wrongful acts after realization of the eminence of danger and with a complete

indifference and unconcern for the consequences of its acts and in joint efforts to promote self-serving benefits to each defendant.

COUNT FOUR

51.

Plaintiff realleges and incorporates paragraphs 1 through 42 of Count One, paragraphs 44 through 48 of Count Two and paragraph 50 of Count Three herein and makes the same a part hereof.

52.

Plaintiff's injuries and damages, including her inability to now conceive and have children, were directly and proximately caused by the willful and negligent misrepresentation in labeling and advertising concerning the Dalkon Shield.

COUNT FIVE

53.

Plaintiff realleges and incorporates paragraphs 1 through 42 of Count One, paragraph 44 of Count Two, paragraph 49 of Count Three, and paragraph 52 of Count Four herein and makes the same a part hereof.

54.

Plaintiff's injuries and damages, including her inability to now conceive and have children, were directly and proximately caused by the fraud in advertising, promoting, selling and in failing to recall the Dalkon Shield, including, but not limited to, the following reckless and/or intentional acts:

(1) Sale of an untested device as thoroughly tested and medically safe;

(2) Claims of lowest pregnancy rate;

(3) Claims of lowest medical removal rate and highest continuation rate;

(4) Claims of superiority over all other I.U.D.'s;

(5) Claiming a new, improved and superior insertion technique;

(6) Failure to disclose the financial interest of investors and consultants;

(7) Failure to disclose and concealing known adverse effects.

(8) Failure to conduct post-market surveillance so as to maintain proper records and disclose serious adverse effects.

COUNT SIX

55.

Plaintiff realleges and incorporates paragraphs 1 through 42 of Count One, paragraph 44 of Count Two, paragraph 49 of Count Three, paragraph 52 of Count Four, and paragraph 54 of Count Five herein and makes the same a part hereof.

56.

In the alternative, plaintiff alleges that the defendant Aetna, acting by and through its officers, agents, servants, employees, attorneys or other representatives, was an undisclosed agent of the defendant Robins in conducting post-market surveillance of the Dalkon Shield, in handling claims and acquiring medical information and notice and knowledge of injury and defectiveness of the device, such that as such agent defendant Aetna acquired and assumed the duties and obligations of defendant Robins, its principal, with respect to third-party users of the Dalkon Shield and plaintiff in particular, and defendant Aetna is jointly and severally liable for its acts and conduct, all as set forth hereinabove, just as is defendant Robins as principal. Such acts and conduct of the said defendant Aetna occurred within the time of the use by plaintiff of the Dalkon Shield, and combined with the acts and conduct of defendant Robins, all as set forth hereinabove, to proximately cause the injuries and damages suffered by plaintiff arising to of the use of the Dalkon Shield.

COUNT SEVEN

57.

Plaintiff realleges and incorporates paragraphs 1 through 42 of Count One, paragraph 44 of Count Two, paragraph 49 of Count Three, paragraph 52 of Count Four, paragraph 54 of Count Five, and paragraph 56 of Count Six herein and makes the same a part hereof.

58.

Because of the aggravating circumstances and wanton nature of defendants' acts and intentions, plaintiff seeks additional damages, in the nature of punitive or exemplary damages, against both defendants to punish and deter the defendants, and others who would in the future repeat the trespasses that these defendants committed by the acts and omissions complained of by this plaintiff.

WHEREFORE, plaintiff prays that summons and process issues and such summons and process and this complaint be served as provided by law upon defendant Robins and defendant Aetna; that plaintiff do have and recover judgment against defendant Robins and defendant Aetna, jointly and severally, for compensatory damages in excess of Seven Hundred Fifty Thousand Dollars and punitive or exemplary damages in the amount of One Hundred Million Dollars; that plaintiff have a trial by jury; and that plaintiff have such other and further relief as is just and necessary.

POPE, KELLOGG, MCGLAMRY,
KILPATRICK & MORRISON

By /s/ C. NEAL POPE
C. Neal Pope

By /s/ EDWARD H. KELLOGG, JR.
Edward H. Kellogg, Jr.

By /s/ R. TIMOTHY MORRISON
R. Timothy Morrison

1213 — 7th Avenue
Post Office Box 1430
Phenix City, Alabama 36867
205/298-7354
Attorneys for Plaintiff

APPENDIX C

Listing of Corporate Affiliations Prescribed by Rule 28.1 of the Rules of the Supreme Court of the United States

Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, respondent Aetna Casualty & Surety Company, a corporation, identifies the following parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates:

1670 Broadway Joint Venture
1800 West Loop Tower Associates
ABP Associates Limited
ADB I
Abcor Insurance Administration
Administradora De Fondos De Pensiones Santa Maria S.A.
Aegen International, Inc.
Aetna Income Shares
Aetna Life and Casualty Limited
Aetna Life and Casualty of Canada Ltd.
Aetna Management Services Pty., Ltd.
Aetna Midland Doherty Finsco Ltd.
Aetna, Peterson, Jacobs and Ramo Technology Ventures
Aetna Variable Fund
Atalfa, Inc.
Beaver Creek Farms Joint Venture
BCI Satellite, Inc.
Biltmore Fashion Associates
Broadway Joint Venture
Callon Institutional Royalty Investors II
Carlsbad Research Center
Carlsbad Research Center Number One
Carlsbad Research Center Number Two
Chris-Town Village Associates
Church Insurance Partnership Agency
Churchill Office Park Ltd.
Compania De Seguros Generales Aetna Banchile S.A.
Cordova Del-Mar Associates
Coronation Drive Joint Venture

Corporate Center Pasadena Associates
Crescent Corporate Center
CS Development Corporation
Dayton Arcade Community Urban Redevelopment Corporation
Dayton Arcade Partnership
East Asia Aetna Insurance Company (Bermuda) Ltd.
Edina Office Center Joint Venture
Elliot S. Associates Limited
Empire Park Associates
Empire Park IV Associates
Ensenada De Las Colinas Asssociates
Friday Associates
Gearhart Industries, Inc.
Generali Do Brazil Companhia Nacional De Seguros
Golden State Associates
Hanover Properties
Hartford Center Hotel Partnership
Hayward Industrial Park Associates
Hillcrest Associates
Huffco U.S. Exploration 1982 Program
Huffco U.S. Exploration 1983 Program
Huffco U.S. Exploration 1984 Program
Ian Morton Underwriting Agency Limited
Japan and Far Eastern Securities Management Limited
KBC-Eastside Limited Partnership
KBC-Paradise Valley Limited
KBC-Red Hill Limited Partnership
Kemble Associates
Koll Center Newport A
Koll Center Newport 8
Koll Center Newport 9
Koll Center Newport 10
Koll Center Newport 11
Koll Center Newport 14
Koll Center Newport 15
La Estrella, S.A. De Seguros
Landex Properties Limited
Lincoln Benicia V, VI & VII

Lincoln Oakland Coliseum 1 & 11 Associates
Lincoln Rancho Cucamonga Associates
Lincoln San Jose VI Associates
Marex Properties Limited
Mariner Brookhollow Joint Venture
Meridian Associates
Montbello Commercial Venture 1
Montbello Commercial Venture 11
Northwest Associates
Oaks at Valley Ranch I
O'Hare Center Venture
Otau Mountain Estates
Parity Computer Limited
Partners National Health Plans
Pelican Beach Motel
Pelican Shores Motel
Ponderosa Homes
Portside Properties, Ltd.
Raintree-Carlton Court Associates
RAJ Boston Associates
RBA 11 Associates
Sabcap Pty., Ltd.
Sandefer Oil & Gas, Inc. 1982 Joint Venture
Sandefer Oil & Gas, Inc. 1983 Joint Venture
San Jose V Associates
Satellite Business Systems
Second & Main Associates
Silverada Mall
Southbank Unit Trust
South Bend Joint Venture
Southcap Pty., Ltd.
Southwest Financial Plaza
Southwest Financial Plaza Annex
St. Vincents Mall
Streamwood Industrial Properties
Taas Associates
Terra Nova Insurance Company Ltd.
Thace Associates

Transponder Leasing Associates
Tri-City Mall Associates
Tri Freeways Associates
Victoria Avenue Unit Trust
Village Park Limited Partnership
Washington Plaza
Westwood Mall Associates